FILED

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CASE NO OFFICE OF THE CLERK

THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1996

LAWRENCE MOORE,

Petitioner,

v.

RUDI M. BREWSTER; KATHY LOWE; DON HENDRIX; LEWIS LEVY; LEVY, GOLDMAN & LEVY; STEVEN SAYLER; HILLYER & IRWIN,

Respondents.

PETITION FOR
WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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171 pp

QUESTIONS PRESENTED FOR REVIEW

1. Are a district court judge, the judge's law clerk, and the district court clerk "absolutely immune" from suit for conspiring with lawyers for a debarred defense contractor and two unions to steal a plaintiff's property without jurisdiction (after he rejected their attempts to extort him into dropping appeals of that judge's dirty tricks to let the contractor and union racketeers escape from trial in a separate suit for evading debarments by breaching their collective bargaining agreement ("CBA"), and for successfully defrauding him and other third party beneficiaries out of millions of dollars, and the federal government out of billions of dollars)?

2. May the circuit court affirm "summary judgment" against union lawyers -- for conspiring with the judge, clerk of court and law clerk: to seize plaintiff's property without any judgment; to misrepresent that their union clients had an "offset"; and to later fabricate an *ex post facto* judgment -- by holding its denial of plaintiff's appeal of that judge's disbursal of his property to the union clients bars him from litigating claims against the lawyers?

3. May the circuit court affirm "summary judgment" against the corrupt defense contractor's lawyers by: holding plaintiff had "failed to produce sufficient evidence" when he was not allowed any discovery; holding the complaint alleged only "proper actions to realize on [the contractor's] judgment" when it had no such timely "judgment"; holding plaintiff "failed to allege ... a single example of misrepresentations" when that judge seized, held, and helped the contractor execute on plaintiff's property based on its lawyers' misrepresentations that it had timely writs of execution; and by holding his claim for intentional infliction of emotional distress is barred because the lawyers' communications to deprive plaintiff of his property were "made during judicial proceedings" when those proceedings were held without jurisdiction?

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CITATIONS TO OPINIONS BELOW

The circuit court's Opinion in this case, Appeal No. 94-56334 and 94-56429 (consolidated) was filed on September 23, 1996, published as *Moore v. Brewster, 96 F.3d 1240* (9th Cir. 1996), and is reproduced herein at Appendix, p. 153, *infra*.

STATEMENT OF JURISDICTIONAL GROUNDS

Jurisdiction over the case was proper in the district court under 28 U.S.C. §§ 1331, 1337 and 1343. The circuit court's jurisdiction to review orders of the district court was proper under 28 U.S.C. § 1291. This Court has jurisdiction to hear this matter under 29 U.S.C. § 1254 (1) and Supreme Court Rule 10.

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STATEMENT OF THE CASE IN DISTRICT COURT

Petitioner filed D.C. # 94-02-R against: Defendants Brewster (he presided over D.C. # 85-1719-B, 87-0172-B and 91-1543-B); Hendrix (Southern District of California court clerk); Brewster's law clerk Lowe; Levy and Levy, Goldman & Levy (International Brotherhood of Electrical Workers Local 569 in-house lawyers in the three cases); and Sayler and Hillyer & Irwin (Fischbach & Moore, Inc.'s lawyers in D.C. # 87-0172-B and 91-1543-B).

Petitioner's Complaint properly invoked the jurisdiction of the court by setting forth a copious statement of the facts upon which he based his right to recover damages, and showing all the causal connections between the facts. The legal duties and the liabilities of Defendants were clearly deduced from those facts.

Wrongful seizure of his property by Defendants had occurred after Fischbach & Moore, Inc. ("Fischbach") moved the court for attorneys fees in D.C. # 87-0172-B and its lawyers tried to extort Petitioner into dropping an appeal of its escape from trial -- by threatening him that Brewster would award attorneys' fees against him equal to his verdicts by separate D.C. ## 85-1719-B and 87-0172-B juries (against the Local 569 Defendants) -- and after Brewster followed through and made that outrageous award.[1]

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[1] Brewster bifurcated trial on Fischbach's breach of contract trial from Union Defendants' trial (for breaching their CBA job referral procedure to let debarred Fischbach's employees transfer to puppet companies it created to evade debarments), ordered Plaintiff to instead first prove exculpatory Union-Management Committees of Defendants (convened *ex post facto* at Brewster's **suggestion** after Fischbach had lost motions to dismiss and for summary judgment) had not represented him fairly, excluded evidence of their conspiracy to evade debarments, would not allow cross-examinations or rebuttals, led defense witnesses, endorsed Defendants' misrepresentations and overt lies, dismissed Fischbach (and brought it back later and dismissed it again), gave the jury prejudicial instructions and after the jury requested clarification gave them more of the same, refused Plaintiff's instructions and, despite Fischbach not going before the jury, held its breach of contract was tried by that jury (see Petition No. 94-439 and Cross-Petition No. 95-1020 to this Court).

On June 11, 1993, 18 months after Hillyer & Irwin's lawyers first moved for Fischbach's attorney fees (it was denied), and one year after their first attempt to extort Petitioner into dropping his D.C. # 87-0172-B appeal, Brewster awarded them $224,140.01.[2]

Petitioner moved under F.R.Civ.P. 59(e) and 60(b) to alter, amend and for relief from the judgment (hearings were scheduled for September 27, 1993) but Respondents' conspiracy had already begun. Lowe admitted on September 15, 23, and 24, 1993 -- while demanding that Petitioner postpone hearings on the motions to November 1, 1993 -- to ongoing conversations with Sayler, to hostility against Petitioner, and that his property was seized.[3]

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[2] Extortion attempts continued while Fischbach's lawyers shepherded Fischbach's attorneys fees request through the same Labor-Management Committee -- this time on Brewster's **orders** -- made up again only of Defendants in Plaintiff's cases. As with the Committee's meetings on Fischbach and Union Defendants' breaches of contract via the transfers, Plaintiff again refused to participate in its "low-life dealings," and Brewster ordered Defendants to make a "default" award against him.

After two Committees refused to award any fees despite Brewster's further orders to do so, a smaller Committee met in secret (no notice) and first made the award, and Brewster then ordered it affirmed.

[3] After Brewster's award he, Fischbach, Union and Trusts Defendants began filing documents with three case numbers (all on appeal) in the caption (Fischbach could file in D.C. # 85-1719-B without standing), D.C. # 91-1543-B (Appeal No. 93-55287, Petition for Certiorari No. 94-556) had been filed against 21 Union officer/trustees (and National Electrical Contractors Ass'n co-trustees) of joint ERISA Trusts after a D.C. # 87-0172-B jury had found 21 Union officers breached LMRDA (29 U.S.C. 501) fiduciary duties by stealing Union funds to inflate personal pensions (Brewster would not order funds returned or accounts modified). Brewster also had ongoing *ex parte* communications with Fischbach's Hillyer & Irwin attorneys in that case in 1992 and 1993.

Petitioner had a letter confirming the acrimonious telephone calls with Brewster's law clerk Lowe hand-delivered to her at chambers (she did not deny any part of those conversations which included Petitioner's candid references to other examples of their partiality for Fischbach). Brewster ordered all such contacts stopped (see Appendix, at p. 54).

The gravamen of the Complaint was Defendants' conspiracy to interfere with Petitioner's Constitutional rights, protected by the Fifth Amendment, to enjoy his property. Brewster seized his property in the federal registry -- after the Local 569 Defendants' losing appeal from D.C. # 85-1719-B jury verdicts became final September 16, 1993 -- and seized it without any jurisdiction over that property, which, prior to the circuit court's mandate being filed on September 16, 1993, was a supersedeas bond on appeal.[4]

To perpetrate the acts Brewster refused to act on Petitioner's concurrent September 16, 1993 request as per 29 U.S.C. § 2042, for an order releasing Petitioner's property, and instead seized that unencumbered property until he heard the motions to amend, alter or for relief from his attorneys' fees award of $224,140.01 to Fischbach in separate, unrelated D.C. # 87-0172-B. Fischbach was never a party to D.C. # 85-1719-B or the Unions' appeals.[5]

Sayler and Levy then filed "oppositions" to the Petitioner's *ex parte* request for an order releasing his property from the registry, wherein Levy and Sayler misrepresented Local 569 had an "offset" and Fischbach had a "lien" against it.[6]

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[4] The district court had no statutory or any other legitimate basis for refusing to release funds deposited in the Federal Registry after losing Local 569 Defendants appeal was final on September 16, 1993. *Lee v. Western Wool Processors, Inc.*, 313 F.2d, at 14 (10th Cir. 1962) (funds deposited in the court's registry by the defendant to stay execution on judgment were released on *ex parte* application by the plaintiff). When the mandate of the court of appeals is issued the case is final. *U.S. v. Rivera*, 844 F.2d 916, 920 (2d Cir. 1988) (citations omitted).

[5] Besides lack of jurisdiction, Brewster's seizure also overstepped the boundaries of Federal and California due process. In absence of a claim of ownership or right to possession adverse to Petitioner's, his property should have been released. *U.S. v. Palmer*, 565 F.2d at 1065 (9th Cir. 1971); *U.S. v. Martinson*, 809 F.2d at 1367-68 (9th Cir. 1987).

[6] Defendants had no writs or liens filed in D.C. # 85-1719-B, and had no legal right to "setoffs," but Brewster, Lowe, Sayler and Levy were conspiring to bring a tentative plan to fruition on November 1, 1993.

Because of Lowe's statements in the conversations, Brewster's advocacy for Fischbach, and their *ex parte* contacts with Hillyer & Irwin lawyers (and the Union Trusts lawyers Kissane & Cook) in D.C. # 91-1543-B), because of increased filings with the three case numbers (all on appeal) in the caption, because court clerk Hendrix refused to put in writing repeated assurances that Local 569 had no judgment against him for appeal costs, and because Brewster refused to act on the September 16, 1993 application to release his federal registry money (posted as a supersedeas bond only in Union Defendants' losing appeal from D.C. # 85-1719-B) the Petitioner asked the circuit court for a Writ of Mandamus, on October 4, 1993, ordering Brewster to release his property.[7]

On October 19, 1993 Brewster's Order denying Petitioner's motion to amend or alter Fischbach's fees award (he refused to postpone it to November 1, 1993, on Lowe's September 24, 1993 request, because Fischbach didn't oppose it) was filed, but the motion to vacate was re-scheduled for November 1, 1993.

On November 1, 1993 only the Petitioner's F.R.Civ.P 60(b) motion for relief from the award of attorneys fees to Fischbach in D.C. # 87-0172-B was noticed, but Sayler, Levy, Messersmith (parent International Brotherhood of Electrical Workers' and its president Barry's lawyer), and Cook (Kissane & Cook) appeared and the stage was set for those conspirators' ambush. Brewster denied the Petitioner's motion for relief, but for over two hours led those lawyers without any motion, notice or jurisdiction in a conspiracy to steal his property (please see Appendix, pp. 57-79), and did it -- fraudulently -- in long-ago final D.C. # 85-1719-B.

Petitioner objected repeatedly that he was being prejudiced, there was no motion or notice, that Brewster had no jurisdiction over the property or the case (and requested he recuse), and that those lawyers had no standing to even be present (App. 59-65).

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[7] Petition for Writ of Mandate No. 93-70839 asked the circuit court to order filing of the 28 U.S.C. § 2042 Order releasing the prevailing Plaintiff's (before the jury and on appeal) property which, prior to the circuit court's September 16, 1993 final mandate on appeal, was always a supersedeas bond and never within the district court's jurisdiction.

At that ambush, Brewster, Lowe, Sayler, Messersmith, Cook and Levy repeatedly misrepresented their clients had liens against Petitioner's property, and that he scheduled a "motion" to release it and "claim of exemption from [ostensible] lien" by Fischbach.

Defendant Sayler admitted the grounds for their conspiracy: "Your Honor, my only confusion is that right now it's the clerk of the Court that is holding money on behalf of the Plaintiff and those are the monies that we're trying to get to," and "there had been some motions submitted by [the Petitioner] trying to get the release of those monies from the clerk," and that, "I am not a party to that case and I'm out of the loop." (App. 59, 61, 63).

Levy also inadvertently admitted (while Brewster led him by misrepresenting, "The bond ... just backs up the judgment") that:

> "The judgment [against his Union clients] has not been satisfied because the proceeds of the bond have not been released towards satisfaction of the ultimate judgment."

Defendant Levy then admitted the conspiracy was ongoing and stated their purpose and intent to defraud by openly insisting,

> "My understanding was that we were going to visit the issue of whether or not Fishback's (sic) judgment for the attorneys fees in the 87 case was valid and whether or not in light of that judgment funds which are being held by the Court, which were the supersedeas bond for the appeal in the 85 case, would then be released to Fishback as a partial satisfaction of the attorneys fees which they had been awarded in the 87 case."

App. 64. Messersmith confessed, "we received a letter from [Lowe] .... indicating what would be heard at today's hearing" (referring to an ostensible claim of exemption), and Brewster duplicitously agreed "That's what I thought." (App. 71).

Messersmith, Levy and Cook all argued on behalf of giving Petitioner's property to Fischbach throughout, and Messersmith and Cook ("I absolutely have a lien") misrepresented that their clients had liens on the Petitioner's registry funds (App. 62). Brewster held Fischbach "withdrew" a "lien," and admitted he had an "obligation to lift any stay on any public money that belongs to parties if there's nothing against the funds" (77).

Levy began arguing that "L & B Electric, not represented here at the present time" also had a lien. Petitioner exploded at the irony of a party who had no standing interfering with release of his property without any jurisdiction on behalf of an entity not even present, and Brewster said he would send an order releasing Petitioner's property to the court clerk "by 4:00 o'clock [and] the rights of the parties flow as of 12:45 today." (App. 76-77).

But Brewster then again "stayed" release of the Petitioner's property until 4:00 P.M. the following day to let Fischbach file "an emergency writ" with the circuit court, and advised Sayler "the lynch pin" of his writ should be a request to reinstate his "lien" (Brewster confirmed Lowe's September 24, 1993 statement that he also stayed release until that November 1, 1993 hearing).[8]

Brewster excused his actions by arguing Fischbach could have executed on the property if he hadn't stayed its attorneys fees judgments pending the denial of the F.R.Civ.P. 60(b) motion.[9]

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[8] The bulk of Petitioner's jury verdicts against Union Defendants was for blacklisting him, and the remainder was for interfering with his rights to free speech and assaults and batteries (with guns) before 1985. After Fischbach fired him in 1986 to hide huge transfers of employees to "puppet corporations" to evade debarments -- and he then filed D.C. # 87-0172-B -- he was assaulted and battered several times at the Union and never got work again. Defendants' intended to starve him out, and Brewster refused requests for injunctive and declaratory relief.

Respondents conspired to continue the economic pressure by seizing Petitioner's property because he wouldn't voluntarily withdraw appeals from D.C. # 87-0172-B, which had documented Brewster's advocacy for Fischbach to let it and the Union Defendants (including the parent International Union's president Barry, the chief Union conspirator) escape from trial on violations of the collective bargaining agreement job hiring procedure to evade debarment, conspiracy and fraud.

[9] Brewster's stay of execution on the attorneys fees judgment in D.C. # 87-0172-B was gratuitous, and unrelated to issuance of the mandate on appeal from D.C. # 85-1719-B. The Petitioner's F.R.Civ.P. 59(e) motion destroyed finality of the attorneys fees judgment, and California lien law destroyed existing liens and prohibited new liens (App. 36).

On November 2, 1993 Petitioner went to the clerk's office to get his property, but the Clerk, Hendrix, only gave him an "Order Denying Plaintiff's Motions for Claim from [Ostensible] Lien, etc." with the three case numbers again printed in the caption, and said no funds would be released to him (App. 80).

That Order, signed by Brewster misrepresented that:

> "2. .... On September 27, 1993 the court spread the mandate from the Ninth Circuit affirming this court's judgment, thereby restoring this court's jurisdiction. Now, plaintiff's "ex parte motion for an order releasing bond," executed July 13, 1993, is presently before the court."
>
> "3. Also before the court is Defendant Local 569's "Opposition of Defendant/Appellee/Cross-Appellant IBEW Local 569 to Ex Parte Motion of Plaintiff/Appellant/ Cross-Appellee Lawrence Moore for Release of supersedeas bond," executed and served September 17, 1993 ...."

App. 80-81.

Brewster's Order also duplicitiously stated that,

> "the court finds that an issue exists as to whether Local 569 is entitled to an offset for a total of $16,328.84 which represents $2,180.84 awarded to Local 569 in case no. 85-1719-B on March 1, 1990, and $14,148.00 awarded to Local 569 on appeal of case no. 85-1719-B on April 30, 1993.

The Order also ordered Hendrix "to release to plaintiff all monies except for those upon which liens existed as of 12:45 p.m. November 1, 1993." However, release of the property was again stayed for another November 24, 1993 hearing (App. 81).

The nonplusing Order also distorted the meaning and intent of Local Rule 67.2 (restating 28 U.S.C. § 2042's intent that registry funds cannot be disbursed by the Clerk after judgment without an Order from a judge) and F.R.App.P. 4 to beg the question that the November 24, 1993 "hearing" was a "trial" and the property could not be released until January 4, 1994 (App. 81-82).

Finally, Brewster brought both Fischbach and L & B Electric, represented by lawyer Mark Bennett (Levy argued on L & B's behalf at the hearing), into the newly rescheduled ambush (82).

Brewster also filed another Order, on November 2, 1993, which had only D.C. # 87-0172-B in the caption and denied the F.R.Civ.P. 60(b) motion to vacate the fees award (App. 83).

But on November 4, 1993 Brewster filed an Order (with those three case numbers in the caption) misrepresenting that a hearing on Petitioner's "claim of exemption" from a lien notice -- which Fischbach filed June 11, 1993 and withdrew October 25, 1993 -- was rescheduled *ex post facto* on that day to November 1, 1993, and made it *nunc pro tunc* to September 20, 1993 (App. 84).

On November 6, 1993 Petitioner supplemented his Petition for Writ of Mandamus, adding a supporting declaration documenting Brewster's ongoing conspiracies and extortion with the Hillyer & Irwin and Levy, Goldman & Levy lawyers -- which produced both the June 11, 1993 award of $224,140.01 attorneys fees and the November 1, 1993 ambush -- and the conspiracy with court clerk Hendrix which began in April, 1993 to award Levy's Union clients another $14,148.00 "costs on appeal" from his property (Brewster and the clerk also gave $2,180.84 of his pre-trial deposition costs to the losing Union Defendants).[10]

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[10] Levy filed a fraudulent declaration swearing his Union clients were awarded $14,148.00 by Hendrix in April, 1993 for transcript costs in Petitioner's Appeal No. 90-55557 (where no transcript was ever designated) from D.C. # 85-1719-B, which was voluntarily designated by Levy in Local 569 Defendants' losing Appeal No. 90-55558, after he had noticed the appeals court, as per F.R.App.P. 10(b)(3), of his clients' intent to appeal twenty issues from jury verdicts for Petitioner.

Petitioner proved no appeal costs judgment ever existed, that he had successfully opposed Levy's appeals court motion for those costs, that the district court's Local Rules stated it did not award costs on appeal (App. 35), that clerk Hendrix evaded answering direct questions about Levy's claims and also lied about holding a "new" costs hearing, that Brewster issued an Order on June 15, 1993 holding the district court had no jurisdiction over the case because the appeals court had not issued its mandate, and that Brewster *sua sponte* "stayed" the release of Petitioner's property after the mandate was issued, permitted those lawyers to file documents without standing, and had presided over a November 1, 1993 ambush without jurisdiction (App. 49, 71-76).

On November 8, 1993 Petitioner received a copy of a letter from Defendant Sayler to Brewster thanking him for telephoning Hillyer & Irwin's "offices" after office hours November 2, 1993 to inform them that none of Petitioner's funds would be released to him, informing Brewster they had re-filed Fischbach's lien and filed a writ of execution (as Brewster repeatedly advised Sayler to do at the November 1, 1993 hearing).

Petitioner then filed another supplement to his Petition for Writ of Mandamus, and a supporting declaration with that latest letter, Brewster's September 29, 1993 Order, and other letters attached which showed both the ongoing extortion attempts by the lawyers and Brewster's ongoing complicity. Brewster moved the new ambush from November 24, 1993 to December 1, 1993.[11]

On December 1, 1993 Brewster and Levy lied in unison about

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[11] The Petition for Writ of Mandamus was rejected by Ninth Circuit chief judge J.C. Wallace, who sits in the San Diego, and like Brewster, his relationships with former San Diego resident Ed Meese -- convicted in the Wedtech Inc. (like Fischbach, a New York corporation) fraud -- have been published. Wallace also headed that panel which denied the Petitioner's appeal from Fischbach, IBEW and Local 569's escape from trial in D.C. # 87-0172-B in an unpublished opinion full of aberrations of the law and facts, and that panel also included Ninth Circuit judge Farris, who later denied Petitioner's appeal from Brewster's dismissal of D.C. # 91-1543-B by maliciously holding Petitioner had voluntarily dismissed that case, and denied a further Petition for Mandamus.

Brewster's malice was not confined to stealing Petitioner's property and eviscerating his jury verdicts here, he has also awarded $50,000.00 fees to Union Trusts lawyer and former assistant U.S. Attorney (offices also in the U.S. Courthouse) Kissane and against Petitioner in D.C. # 91-1543-B -- aided by circuit judge Farris -- and has abused his rights of access to the district court, and to appeal, by imposing $300,000.00 in bonds on Petitioner to sue or appeal, and by awarding $300,000.00 in attorneys fees against him (see, e.g. App. 47-48, 113, 123-127).

The incestuous relationship between district and circuit judges in the San Diego U.S. Courthouse startled Petitioner during visits to chambers when Brewster said he was "helping a friend" with stacks of emergency appeal briefs filed by executed child-killer Robert Alton Harris.

the entire circumstances of those transcript costs on appeal (while Hendrix stood by), Messersmith and Cook lied they had liens on Petitioner's property, Brewster and Petitioner's erstwhile lawyer George dela Flor misrepresented the law on lawyers rights to fees after withdrawing from contracts with clients (Sayler and/or Levy had contacted Flor), Brewster and L & B Electric's lawyer (Levy contacted him) lied that its defective notice of lien (served late and without ever conforming to California law) entitled it to seize Petitioner's property, and Brewster and Sayler lied that Fischbach had filed a writ of execution (App. 85-113).[12]

Brewster refused to recuse himself on the Petitioner's written motion and declaration, even lied about the relative interest rates, stated, "There will be no money for the Plaintiff," and disbursed his property to everyone except clients of Messersmith and Cook (whom he held on November 1, 1993 had liens) (App. 86-96).

While reconstructing the record after the Appeals Court's April 1, 1993 Opinion Petitioner discovered Brewster hadn't filed his September 16, 1993 request for a 28 U.S.C. § 2042 Order, and instead made a false record. Petitioner moved to correct the Civil docket, Brewster misrepresented he rejected that "request," and that his "jurisdiction" over D.C.# 85-1719-B was restored by spreading the final September 16, 1993 mandate (App. 53, 122).

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[12] Flor, a drug-abuser who was sanctioned for missing deadlines and had abandoned Petitioner in the middle of a deposition in his first period of representation, lied his drug problems were over and used a former co-plaintiff to convince Petitioner to give him another chance, but regressed to missing deadlines and even more-serious drug abuse, and managed to have Petitioner pay him almost $10,000.00 before he withdrew again. Ironically, Brewster refused to award Flor attorney's fees in the case-in-chief despite explicit statutory and case authority.

Flor first telephoned the Petitioner to insist Brewster was going to give his jury verdicts to Fischbach, and proposed submitting an inflated attorney's fees claim -- which had priority -- to Brewster's court and then splitting everything. After Petitioner declined Flor threatened to join the other lawyers and get fees from Brewster unless Petitioner paid him $10,000.00 immediately. Plaintiff declined again and then filed an unrefuted declaration with Brewster articulating Flor's outrageous acts.

D.C. ## 85-1719-B, 87-0172-B and 91-1543-B Defendants had conspired to award the $224,140.01 attorneys fees against him, but Brewster had jurisdiction to make that award and could not be sued. But he had no jurisdiction to seize jury verdict damages from D.C. # 85-1719-B after Union Defendants' losing appeal was final on September 16, 1993 to satisfy the award of $224,140.01 attorneys fees to Fischbach in D.C. 87-0172-B.

On December 6, 1993 the Petitioner filed D.C. # 93-1857-K against Union and Fischbach Defendants in Case No. 87-0172-B, and Contractors Ass'n Defendants in Case No. 91-1543-B, who had fraudulently conspired to award $224,401.01 attorneys fees to corrupt defense contractor Fischbach and against Plaintiff under a collective bargaining agreement which violated public policy. The specious attorneys fees award affirmed by Brewster was reversed in an appeal documenting Brewster's advocacy on behalf of Fischbach. *Moore v. Local 569 of the IBEW*, 53 F.3d 1054 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 908 (1996).[13]

On January 2, 1994 Petitioner filed D.C. # 94-02-R against Respondents. D.C. # 94-02-R was bounced among Defendant Brewster and two other district judges: biased Judith Keep, and John Rhoades (to whom related D.C. # 93-1857-K was assigned) and Petitioner requested D.C. # 94-02-R be assigned to Rhoades under the provisions of the Local Rules. In back-room dealings, and over Petitioner's objections when Brewster and Keep both asserted jurisdiction over both cases, D.C. # 93-1857-K was re-assigned to Keep and D.C. # 94-02-R was assigned to Rhoades.

Respondents Sayler and Hillyer & Irwin had ongoing contacts with Brewster throughout this case, including the information that Keep was assuming jurisdiction over D.C. ## 94-02-K, and 93-1857-K, as attested to by Sayler's letter, an exhibit on appeal.

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[13] But an ally of Brewster patron-and-San-Diego-Ninth-Circuit-chief-judge J.C. Wallace wrote the published opinion which changed the true names of the "*Moore v. Fischbach*" appeal and that *Labor-Management Committee* which made the award, and two same-day decisions weren't published (reversing Brewster-ally district judge Keep's dismissal of D.C. # 93-1857 against conspiring *Committee* members and lawyers).

Respondents Sayler, Hillyer & Irwin, Levy, and Levy, Goldman & Levy all filed answers to the Complaint, but Respondents Brewster, Lowe and Hendrix filed an Ex Parte Application For Order Designating Time To Respond To Complaint (it was granted) and never answered.

Plaintiff served requests for admissions, interrogatories and requests for productions of documents on Defendants Levy and Levy, Goldman & Levy, Sayler and Hillyer & Irwin. All discovery was temporarily stayed without documents being filed and before responses were due.[14]

Defendants Sayler and Hillyer & Irwin then filed a Motion to Dismiss and supporting documents arguing they were shielded from any liability by the California Civil Code, that they did not owe Petitioner any duty to not fraudulently conspire against him, that Brewster was "absolutely immune from any damage claim," and that once Brewster was removed as a Defendant the entire Complaint should be dismissed under F.R.Civ.P 12(b)(6) because of Brewster's "official immunity."

Defendants Brewster, Lowe and Hendrix also filed a Motion To Dismiss, Or In The Alternative For Summary Judgment with

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[14] Discovery was to establish Levy voluntarily ordered the entire trial transcripts in Local 569 Defendants' Appeal No. 90-55558 from D.C. # 85-1719-B and not in Petitioner's Appeal No. 90-55557, that those transcripts were always in Levy's possession, and that Petitioner never even had access to the transcripts, that Levy filed a Bill of Costs for $14,148.00 in the Circuit Court fraudulently claiming the losing Local 569 Defendants incurred those costs in Appeal No. 90-55557, that after Petitioner opposed and the Circuit Court rejected it Levy filed the same Bill of Costs in district court without serving Petitioner, that Levy had telephone contacts with Brewster's chambers, with Hendrix, Sayler and other attorneys for non-parties to interfere with release of the federal registry funds to the Petitioner, and to get Levy, Goldman & Levy's telephone bills to show those contacts.

Discovery was also to show Sayler's contacts with Fischbach's New York attorney Glen Bronstein (he was also a party to the attorneys' fees extortion), Brewster's chambers, Lowe (his law clerk), Levy, and other attorneys for non-parties to D.C. # 85-1719-B to conspire with them to extort and blackmail Petitioner and interfere with release of his federal registry funds, and to get Hillyer & Irwin's telephone records.

a supporting memorandum begging the important factual issues, and argued for collateral estoppel and judicial immunity.[15]

Defendants Levy and Levy, Goldman & Levy filed a Motion For Summary Judgment Re Dismissal Of Entire Action under FRCP 56(c) on grounds issues of fact that they admitted to (their communications with other non-parties to interfere with release of registry funds, their filing of fraudulent Bills of Costs, and their misrepresentations that they had judgments awarding costs) were not triable, and on grounds they did not owe Petitioner any duty to not conspire against him, and also supported it with a Declaration of Defendant Lewis Levy.[16]

The court again "temporarily" stayed discovery without any documents being filed by Defendants (and before responses were due), this time including the disingenuous -- and pretextual -- caveat "except for that which is required to respond to motions."

Defendants Sayler and Hillyer & Irwin filed a Joinder to the motion of Defendants Levy and Levy, Goldman & Levy which consisted of a Declaration by Defendant Sayler very similar to

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[15] The memorandum misrepresented as "facts" that Petitioner had challenged "interlocutory" proceedings and disposition of a "bond" on grounds Brewster had no jurisdiction because the mandate wasn't "spread," argued Brewster had "absolute" immunity (and Hendrix and Lowe had quasi-judicial immunity), invalidly begged a question that Plaintiff's claims pertain solely to "judicial acts," admitted that Hendrix had acted "in response to orders and directions from Judge Brewster," and implied that Defendant Lowe's acts were "supervised, approved, and adopted" by Defendant Brewster.

[16] Defendant Levy swore the gravamen of Petitioner's Complaint was the conspiracy with others to interfere with the registry funds, lied the court ordered him to order trial transcripts in Appeal No. 90-55557, and the Petitioner used Levy's transcript, lied an April 1, 1993 Opinion (later amended) on appeal was published (to imply finality and justify premature filing of Bills of Costs), swore he served a Bill of Costs filed in the district court on April 14, 1993 on the Petitioner, that Defendant Local 569 had "a valid offset," that "other parties ... had valid liens," and that Hendrix granted Local 569's Bill of Costs on April 29, 1993.

Levy's, admitting that his client Fischbach was never a party to D.C. # 85-1719-B, that he had tried to interfere with release of federal registry funds to Plaintiff, and that his conversations with Brewster and/or Lowe were improper in light of Brewster's order that all communications must be writing.

Petitioner's Oppositions and supporting Declarations exposed the misrepresentations and contradicted all factual contentions by Defendants, showed many genuine issues of material fact existed and many triable issues in the record before the court. Plaintiff's separate F.R.Civ.P. 56(f) Declaration showed that he was not given any time to develop other facts, even though the individual Defendants had confessed to both conspiratorial communications and to fraudulent misrepresentations.

Defendants Levy and Levy, Goldman & Levy, Sayler and Hillyer & Irwin filed Replies arguing that the collateral awards of attorneys fees and costs by Brewster were "litigation" which precluded this suit for fraud and conspiracy, that Plaintiff could not show the conspiracy ("which [the Levys had] admitted with respect to parties who had existing liens against or an interest in the supersedes bond"), and that discovery must not be permitted because their conspiracy to interfere with Petitioner's property is "irrelevant." Lewis Levy's Declaration proved they continued the conspiracy to award transcript costs despite full awareness of the evidence of their fraudulent misrepresentations.[17]

The Reply by Defendants Sayler and Hillyer & Irwin made issue preclusion arguments, argued the Petitioner's version of the litigation against Fischbach wasn't based on Petitioner's personal knowledge of the facts, and argued attempts to **extort** Petitioner

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[17] A Declaration by in-house Union and Union Trusts co-attorney Matthew Kissane invalidly appealed to the authority of a transcript of a hearing before Judge Keep (who seized jurisdiction over D.C. # 93-1857-K -- against those Union, Trust, Fischbach, and Kissane & Cook Defendants who conspired to award $224,140.01 attorneys fees against Plaintiff -- after Brewster had attempted to grab it from Judge Rhoades to whom it was assigned under the Local Rules) to demonize Plaintiff, but cited no transcript passages to support his *ad hominems*.

into dropping his appeal from Defendant Brewster's dismissal of Fischbach in D.C. # 87-0172-B -- by threats they would **seize his jury verdicts** against the Union Defendants if he refused (and which, **via their conspiracy with Judge Brewster, was done**) -- were protected "settlement negotiations."

The court "waived" all oral argument and ordered Defendant Levy to file copies of Petitioner's Petition for Writ of Mandamus No. 93-70839, which asked the circuit court to order Brewster to release those registry funds.[18]

Defendants Sayler and Hillyer & Irwin were granted summary judgment, and their Motion to Dismiss was then held to be moot. No Defendants ever answered discovery requests (App. 128).[19]

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[18] "Waived" meant **prohibited** and harked back to the chaos over who would preside over this case and D.C. # 93-1857-K when Brewster had grabbed both cases. Petitioner believes Brewster did preside over the cases behind the scenes and write all summary judgment orders in this case, which repeated factual misrepresentations, partiality and bias from D.C. ## 85-1719-B, 87-0172-B and 91-1543-B. Judge Rhoades could not have reviewed thousands of documents filed in those three cases to enable him to repeat abuses of the law and facts in Orders dismissing the Defendants here, especially since all files (except Brewster's copies) were at the Circuit Court because the cases were still on appeal.

[19] The order granting Sayler and Hillyer & Irwin summary judgment misrepresented: appeals from Case No. 85-1719-B were consolidated; that Fischbach was a Defendant in D.C. # 87-0172-B because Plaintiff worked for it for five days; that Sayler was the primary attorney for Fischbach on D.C. # 87-0172-B (It was senior partner Norm Allenby. Hillyer & Irwin, like Gray, Cary, Ames & Frye -- where Brewster was senior partner before his federal job -- is one of San Diego's big three local law firms specializing in defense of corrupt defense contractors.); that a jury exonerated Fischbach and $224,140.01 attorneys fees were awarded pursuant to pre-trial agreement by an "independent arbitration committee"; and the November 1, 1993 "hearing" was to determine validity of claims by Petitioner's "creditors." The order held Sayler and Hillyer & Irwin were immune from suit for infliction of emotional distress because all "communications" were in judicial proceedings.

The court then regurgitated most of that Order which granted summary judgment to Sayler and Hillyer & Irwin, again invoked the doctrine of issue preclusion speciously (Petitioner was limited to "direct appeal to the Ninth Circuit"), held the Petitioner can't state civil conspiracy claims against the Levy, Goldman & Levy Defendants because they did not owe him any duty to protect his interests, that Petitioner had failed to go beyond the pleadings and designate any specific facts showing that there is a genuine issue of fraud for trial, that the Levy and Levy, Goldman & Levy were immune from suit for causing emotional distress, and granted the Levy Defendants summary judgment (App. 137-144).

That order also misrepresented "all three appeals [in D.C. # 85-1719-B] were consolidated," that Brewster required Local 569 to order and pay for the transcripts of that consolidated "appeal," that Levy sought "apportionment" of the $14,148.00 in transcript costs by filing a Bill of Costs, that Hendrix had then awarded the $14,148.00, that the Petitioner had "petitioned" for release of the "bond," that Brewster divided it amongst Petitioner's "creditors" to pay "claims," that Petitioner "objected" to Hendrix taxing him $14,148.00, and that Brewster allotted it.

Defendants Brewster Lowe and Hendrix replied to Petitioner's Opposition with personal attacks and appeals to the authority of their argument to further beg immunity questions by fiat ("there is no need for this Court to sort through Plaintiff's allegations" because "motive and intent are irrelevant" to considerations of immunity). An order granting summary judgment held they had immunity and Petitioner could not "cure the defect" (App. 145).[20]

A final order and judgment terminating the case was filed on July 27, 1994 and Plaintiff timely appealed (App. 152).

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[20] That Order granting summary judgment to Brewster, Lowe, and Hendrix misrepresented all three appeals from D.C. # 85-1719-B were "consolidated," that Hendrix had awarded costs, that the "bond" was apportioned to "creditors" by Brewster, and had new misrepresentations that the Writ of Mandamus Petition was filed after "apportionment" of Petitioner's property, distorted the factual basis of the lawsuit. and begged the question that Brewster's acted "within his jurisdiction."

STATEMENT OF THE CASE ON APPEAL

On appeal oral argument was again prohibited, and the court begged central questions of whether Petitioner's property was a "supersedeas bond" after the appeal court's final mandate issued, and whether judge Brewster had "jurisdiction" over that property.

The appeal court misrepresented that Petitioner "moved for a release of the proceeds of the $70,000.00 bond" that "judgment creditors filed claims against the bond," and Brewster distributed it "to satisfy [Fischbach's] fee awards and granted an offset ... to Local 569 for reporter transcript costs taxed to Moore as a losing appellant." The appeal court repeated all of the factual misrepresentations contained in district court Orders dismissing the Defendants (which were actually exculpatory briefs).

The appeal court also misrepresented the extent and nature of Petitioner's **three requests** to take notice of a transcript of the December 1, 1993 hearing, of his opening appeal brief in D.C. # 93-1857-K where the $224,140.01 fees award was reversed, (a transcript of that November 1, 1993 hearing was in the Excerpts of Record on appeal here), a letter showing that a Brewster Order that Fischbach repay funds disbursed (filed only after Fischbach's Petition to the Supreme Court was denied in February, 1996) has been ignored), and two letters and stipulation between Sayler and Kissane -- approved by Brewster -- disbursing $46,429.75 (plus 10% interest of $5,800.00) of Petitioner's D.C. # 87-0172-B jury verdicts long after Fischbach's legal interest was reversed.

The appeal court also begged the question that Brewster acted well within his jurisdiction, that Hendrix (who never executed an order taxing any appeal costs, but would not write or state that) did quasi-judicial functions and Lowe had absolute immunity.

The appeals court also misrepresented that the claims in the Petitioner's complaint against all the Defendants were litigated on the merits in his appeal of Brewster's award of transcript costs and therefore barred by issue preclusion, that Petitioner -- whose every effort at discovery was stayed -- failed to produce sufficient evidence (ignoring sufficient evidence attached to his declarations supporting Oppositions to Defendants motions) on conspiracy and fraud claims, and that emotional distress caused on November 1, 1993 and thereafter was in judicial proceedings (App. 153-165).

SUMMARY OF ARGUMENT

Petitioner won jury verdicts and costs in 1989 (App. 37-39), was the prevailing party in D.C. # 85-1719-B (see Local Rules, at App. 35) but presiding judge Brewster ordered 75% of his deposition costs awarded to losing Union Defendants, making the Rules and hearings on costs before the Clerk a sham (App. 40).

Local Union Defendants noticed intent to appeal twenty issues (F.R.App.P. 10(b)(3)), and culled and designated only portions of the trial transcripts which supported their argument. Petitioner informed Levy of their obligation to make the full record (Circuit Rule 10-3.1(d), App. 34), and they unilaterally ordered the entire transcript. Parent Union Defendants filed an appeal, culled only transcript portions which favored them, and filed a certificate of non-necessity after being shown their obligation (Circuit Rule 10-3.3, App. 34). At the hearing on the certificate Brewster did not allocate costs (as required by C.R. 10-3.3), Petitioner objected, but all Union Defendants used the Local transcripts (App. 41-46).

Petitioner appealed directed verdicts, but didn't designate transcripts because he appealed only issues of law. Upon reading transcripts at the district court he found Brewster had deleted the testimony of witnesses who implicated Parent Union Defendants in the Local Union's illegal acts, and informed the appeal court. All the Union Defendants' appeals were consolidated (App. 45). Local Defendants posted a $70,000.00 supersedeas bond.

When Petitioner sued Union Defendants blacklisted, assaulted, battered, fined, suspended and expelled him from the Union, he was fired by Fischbach after eight days to hide transfers of its Union employees to puppet corporations created to evade federal debarments, he discovered a nationwide conspiracy by Fischbach and Union Defendants to evade debarments (which violated their collective bargaining agreement and limited his job opportunities) and he sued then all in D.C. # 87-0172-B. During discovery he found records of Union officer thefts of Union funds to inflate their personal pensions and get cut-rate health benefits in Union Trusts, and then sued them for breaching their fiduciary duty.

At another jury trial in D.C. # 87-0172-B he won most claims against Union Defendants, but Brewster interfered *in limine*, and refused to let Union and Fischbach Defendants stand trial on their

joint conspiracy to evade debarments, and to fire the Petitioner. The jury held Union Defendants breached their fiduciary duty but the judge would not order them to repay the stolen money or trim their pensions, and Petitioner appealed again, as did the Local.

Union Defendants began assaulting him again, Petitioner sued again, and included claims for violations of ERISA by Union and Contractor trustees (including biggest contractor Fischbach), after finding they were looting ERISA joint Trusts. Brewster dismissed the assault claims, ordered him to drop some claims and punitive damage and jury trial requests, awarded $3,500 fees against him for moving to add new battery claims, imposed a $200,000 bond condition on proceeding, and dismissed Fischbach, and the case.

Fischbach's lawyers tried to extort him into dropping the appeal from D.C. # 87-0172-B, openly threatened and conspired with the judge to award $224,140.01 attorneys fees against him, which was equal to the supersedeas bonds, plus interest, which Union Defendants had on deposit in the federal registry.

Petitioner filed an F.R.Civ.P. 59(e) motion to alter or amend the award to Fischbach -- destroying the finality of the judgment -- and an F.R.Civ.P. 60(b) motion to vacate, and that award was stayed pending a ruling. (He later appealed that award, Brewster put bond-posting conditions on any appeals he filed, and awarded $48,000 attorney fees to D.C. # 91-1543-B Trusts Defendants.).

While those attorneys fees motions were pending in D.C. # 87-0172-B, the appeals court issued an Opinion denying the two groups of Union Defendants' appeals from jury verdicts in D.C. # 85-1719-B (as well as Petitioner's), an Order denying their petitions for rehearing was filed on August 30, 1993 (App. 51), and the final mandate was issued September 16, 1993 (App. 52).

After the April 1, 1993 Opinion was filed, Local Defendants filed a bill of costs with the appeals court in Petitioner's appeal, fraudulently misrepresenting that transcript costs they incurred only in their losing appeal were incurred in Petitioner's appeal. He opposed successfully, and their request for costs was denied. But Levy filed a similar bill of costs in district court without serving Petitioner, buoyed no doubt, by the fact that Brewster had earlier awarded Defendants half of his deposition costs.

Petitioner sent Brewster a request for a 28 U.S.C. § 2042 order releasing registry funds which were the supersedeas bond,

Union Defendants from D.C. # 85-1719-B, Fischbach from D.C. # 87-0172-B and Union Trusts from D.C. # 91-1543-B then filed attempts to create liens, writs, oppositions, and stays of release. Brewster held he could not entertain anything because the appeals court had jurisdiction until its mandate was issued (App. 49).

However, Clerk Hendrix became evasive in response to direct questions from Petitioner about Levy's declaration (in Opposition to Petitioner's request for an order releasing funds, that Hendrix awarded transcript costs denied by the appeals court) and whether Levy's clients were awarded the costs while the case was still on appeal, while the district court had no jurisdiction, and in the face of Local Rules that the district court did not award costs on appeal (App. 35). Hendrix stated that he never signed any order for such costs, and no such order or judgment was ever filed in the Civil Docket or mailed to the Petitioner, and none existed.

The final mandate on appeal was issued September 16, 1993 (App. 52), the supersedeas bond ceased to exist, Petitioner was entitled to be made whole from the registry, and he concurrently filed another 28 U.S.C. § 2042 request for release. No liens or writs lawfully encumbered his right to those funds at that time.

Another blizzard of filings from the same parties ensued, and Brewster's law clerk Lowe admitted, in telephone conversations, she was coordinating and encouraging those filings on Brewster's behalf, and that Brewster related release of the registry funds to that $224,140.01 fees award to Fischbach in D.C. # 87-0172-B. Brewster filed confusing Orders (App. 84), and Petitioner knew from events in D.C. # 91-1543-B that such filings and behind the scene manipulation were part of his *modus operandi*. Petitioner didn't know why a September 28, 1993 Order denied his request *nunc pro tunc* to release funds, and only later realized the Order did not respond to his September 16, 1993 request (App. 53).

Because of very heated telephone conversations with Lowe on September 23 and 24, 1993, when Petitioner wouldn't reschedule his F.R.Civ.P 60(b) motion to vacate the fees award in D.C. # 87-0172-B -- which Fischbach did not oppose -- to November 1, 1993 (Lowe also said Brewster would not release funds from the first case despite September 16, filing of the final mandate on appeal), Brewster filed an Order on September 29, 1993 limiting all parties' contacts with chambers to writing (App. 54), and

also opposed Petitioner's unopposed F.R.Civ.P. 60(b) motions himself, as his Order clearly shows (App. 55).

Petitioner realized on November 1, 1993 that Brewster had his own agenda related to registry funds (App. 57-79), and learned a few days later that he and Lowe continued telephone contacts with the lawyers for Defendants in all three cases (and that his Order prohibiting such contacts was only to trick the Petitioner), and learned after the December 1, 1993 "hearing" that Brewster never filed -- and wrongfully withheld from the civil docket -- the September 16, 1993 request for release of funds (App. 122).

No Order related to costs on appeal existed until Brewster filed such an Order on December 15, 1993 (App. 114). It did not exist on September 16, 1993 when the appeals court mandate was filed, and federal registry funds should have been released to the Petitioner as per his 28 U.S.C. § 2042 request. Further, Local Union Defendants had no counter-suit, or made no motion which could have produced any judgment against his *bona fide* judgment against them. No offset could have existed prior to Brewster's award of Union Defendants' transcript costs against Petitioner in the December 15, 1993 Order (App. 114).

No liens existed as of September 16, 1993 either, and such liens, even if they conformed to requirements of California law, would also have been extinguished by that law (App. 36).

The finality of Brewster's attorneys fees award to Fischbach was destroyed by Petitioner's F.R.Civ.P. 59(e) motion, and was stayed by Brewster after his F.R.Civ.P. 60(b) motion (App. 36). Fischbach had no judgment it could act on between September 16 and November 2, 1993. Brewster denied the Petitioner's motion. Fischbach had no judgment it could execute on by filing a writ of execution against Petitioner's D.C. # 85-1719-B judgment.

No such lien or writ based on the $224,140.01 in attorneys fees to Fischbach could exist prior to Brewster's November 2, 1993 Order denying those motions (App. 36), and none was filed against the D.C. # 85-1719-B judgment before the December 15, 1993 Order (a nullity because Brewster had no jurisdiction over a bond posted on appeal he should have released to Petitioner).

No writ of execution was ever filed against Petitioner's judgment in D.C. # 85-1719-B which was his federal registry property after the supersedeas bond expired September 16, 1993.

ARGUMENT

I.

This petition should be granted because the district court's dismissal of Petitioner's suit against a district court judge, his law clerk, and the clerk of the court for seizing his property without jurisdiction, notice or due process overstepped the boundaries of accepted procedure, and both the dismissal and the appeal court's affirmation of that dismissal departed from the usual course of judicial proceedings, conflicted with applicable decisions of this court, and require exercise of this Court's powers of supervision.

When D.C. # 94-02-R was filed in district court and assigned to judge Keep under the Clerk's random system Brewster had the case reassigned to him, and recused only because the assistant U.S. attorney representing him insisted. Petitioner asked that it be re-assigned to Judge Rhoades because 93-1857-K -- against the Defendants in earlier cases who acted as a "Labor-Management Committee" to award $224,140.01 attorneys' fees for Fischbach **on Brewster's order** -- was assigned to Rhoades.

Although re-assignment of those cases was done without any motions or hearings, Petitioner later got copies of letters showing Brewster kept Hillyer & Irwin's lawyers updated on everything.

Any doubt about Brewster's judicial philosophy was erased at the December 1, 1993 "hearing" when he even stole "interest" by repudiating the Federal Courts Improvement Act (28 U.S.C. § 1961) and disbursed the Petitioner's property without jurisdiction to conspiring lawyers for parties who had no standing by stating that, "[M]y ruling has to be that the [Petitioner's] money is gone .... [but] we have to do it right," and explained to the lawyers:

> "I mean, that's the whole -- that's the whole foundation of our judicial system.
> I mean, its like a criminal case where everybody knows that the criminal is dripping-wet guilty like a baby white elephant in the snow, but we still have to give him a due-process trial, right?"

(App. 109). "Do it right" meant pay lip service to the rules, and the Fifth Amendment to the Constitution. Brewster stated openly at one hearing, "I'm a federal judge. I can do anything I want."

In June, 1993 Brewster began filing Orders and the Hillyer & Irwin Defendants began filing documents with three case numbers in the caption, even though all three -- including D.C. # 85-1719-B -- were still on appeal. Petitioner protested to no avail, but that device let Fischbach and the Union Trusts file documents in D.C. # 85-1719-B, and attend the hearings without any standing.

Brewster violated Petitioner's Fifth Amendment right to enjoy his property, seized that property without jurisdiction by refusing to file an order releasing it, and thereby also negated Petitioner's Seventh Amendment right to a jury trial by seizing the verdicts.[21]

He was actively assisted by Defendant Lowe. Hendrix would not file any order awarding the groundless and fraudulent appeal costs against Petitioner, but his Clerk duties were statutory, and he stood by and participated in the fraud by the other Defendants. Brewster misrepresented at the December 1, 1993 hearing that he had an order awarding the costs before him (App. 100-113).[22]

The voluminous district court orders dismissing Brewster,

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[21] The court never had *in rem* jurisdiction over the Registry funds, the *res*, while it had jurisdiction over the case because it was deposited by Local 569 after filing a notice of appeal. The cash was only deposited with the court to stay execution on jury verdicts, and "release of the *res* from the control of the court [should have ended] its jurisdiction." *U.S. v. Wingfield*, 822 F.2d 1466, 1471 (10th Cir. 1987)., citing 4C Wright & Miller, *Federal Practice and Procedure* § 1070, 270 (1969). In the absence of power to arrest the *res*, no decree *in rem* could be rendered against the *res*. *Alyeska Pipeline Service Co. v. Vessel Bay Ridge*, 703 F.2d 381 (9th Cir. 1983). It is axiomatic that *in rem* jurisdiction exists only where the subject matter of the action, the *res*, is within the jurisdiction of the court. *American Bank of Wage Cl., v. Registry of Dist. Ct. of Guam*, 431 F.2d 1215 (9th Cir. 1970).

[22] Local Rules state that, "The District Court does not tax or retax appellate costs" (App. 35). Local Rules have the power of law, and are binding on the parties until they are changed by a majority of the judge's of the districts. Wright & Miller, *Federal Practice and Procedure*: Civil § 3153, citing *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100, 1103 (10th Cir. 1972).

Lowe and Hendrix, and granting summary judgment to the Levy and Hillyer & Irwin Defendants, are little more than exculpatory briefs attempting to create a false record, and were obviously written by Brewster, even though he nominally recused.

The district and appeal court erred by finding Brewster "acted well within his jurisdiction" in seizing Petitioner's property, and begged the questions whether "offsets," "judgment creditors" and a "writ of execution" existed when he seized the property.[23]

Petitioner proved in his Oppositions to Defendants motions to dismiss that no offsets, judgment creditors or writs of execution existed when he applied for the release of his property from the federal registry on September 16, 1993. Brewster admitted at the November 1, 1993 hearing that he had a duty to release the funds and stated he would order release to Petitioner at 4;00 P.M. that day (App. 77). Nothing happened then or until 4:00 P.M. the following day -- when he issued an order refusing to release it -- which could have given Brewster jurisdiction and immunity.

As this Court held in *Bradley v. Fisher*:

> "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."

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[23] The Constitution (Article 3, § 2) limits exercise of judicial power to "cases" and "controversies," and a cornerstone of this limitation is that a federal court should only decide questions necessary for adjudication of the case before it. See, e.g. *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-70, 67 S.Ct. 1409, 1419-20, 91 L.Ed. 1666, 1677, 1679 (1947); *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 463-64, 81 L.Ed. 617 (1937) (A "controversy" in this sense must be one that is appropriate for judicial determination); *Tennessee Publishing Co. American National Bank*, 299 U.S. 18, 22, 57 S.Ct. 85, 87, 81 L.Ed. 13, 15 (1936).

13 Wall. 335, 351-352, 20 L.Ed. 646 (1872).

Although the appeal court labored mightily to establish "two limits" on the doctrine of judicial immunity, such an artificial separation begs the question of whether a judge can be above the law for nebulous "judicial acts" without any jurisdiction. Such a ludicrous, self-serving interpretation of the law by the guardians of the Constitution, in this case, would mean that a surgeon would be immune from suit for hitting someone with a garbage can on grounds he had used his hands.[24]

II.

This petition should be granted because the district court's grant of summary judgment in Petitioner's suit against the judge's co-conspiring attorneys -- for a corrupt defense contractor who was concurrently being sued before the judge for firing Petitioner to conceal its successful conspiracy to evade debarments and to defraud the federal government of hundreds of millions of dollars -- overstepped boundaries of accepted procedure, and granting summary judgment and the appeal court's affirmation of that summary judgment departed from the usual course of judicial proceedings, conflicted with applicable decisions of this court, and require exercise of this Court's powers of supervision.

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[24] The constitutional guarantee of procedural due process applies to governmental deprivation of any legitimate "property" interest within the meaning of the Fifth Amendment. *Mitchell v. W.T. Grant Company*, 416 U.S. 610, 624, 91 S.Ct. 1895, 1908 (1974).

Plaintiff has the right under general law to possession or enjoyment of his property, and may maintain an action in tort against those who have denied him that right. *Land v. Dollar*, 330 U.S. 731, 738, 67 S.Ct. 1009, 1012, 91 L.Ed. 1209 (1947), *citing U.S. v. Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 172 (1882).

"The hallmark of property ... is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 1155, 71 L.Ed. 2d 265 (1982). Brewster's refusal to release registry funds was an unconstitutional seizure without prior notice or a hearing. 4 Wright & Miller, *Federal Practice and Procedure* § 1070, at 423 (1987).

Defendants Sayler and Hillyer & Irwin misrepresented that their client Fischbach had writs and liens of every description filed in D.C. # 85-1719-B from the time that the appeal court issued its Opinion denying the Local and International Unions' appeals on April 1, 1993. They conspired with Brewster, Lowe and the Levy Defendants to interfere with Petitioner's property because those same parties were concurrently trying to extort him to drop appeals from D.C. # 87-0172-B. But the record is clear that Fischbach never had any lien or writ of execution filed against Petitioner's judgment, and Brewster had no jurisdiction.

The district court held Petitioner's claims against Sayler and Hillyer & Irwin were barred by the doctrine of issue preclusion, on grounds issues were raised in a petition for writ of mandamus and an appeal, and begged the questions that his claims were the award and set-off of attorneys fees against Petitioner's registry funds by Brewster. Both issue preclusion and the gravamen of this case were misrepresented again by that court misstating,

> "the crux of his present action is that the $70,000.00 bond was wrongfully released to other parties ... and involves the very same questions which were at issue in the previous litigation ... on appeal."

App. 133.

That court went on to hold that a claim for conspiracy is not viable because the appeal court is considering Brewster's decision to allow creditors (sic) to attach the bond and it "cannot form the basis of a separate action," Sayler and Hillyer & Irwin can't be sued because they owed Plaintiff no duty to "protect his interests" and they are entitled to judgment as a matter of law" (App. 134).

The court held Petitioner failed to allege specifically how they "misled" him and he produced no facts supporting his allegations, that the Defendants met requirements by showing the absence of evidence, and are entitled to judgment as a matter of law because Plaintiff did not "go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial" (App. 135).

The appeal court's Opinion repeated the canards. There were no "creditors" until Defendants' fraud and conspiracy produced a December 15, 1993 order by Defendant Brewster and there was no "bond" after the Local Union Defendants losing appeal from

D.C. # 85-1719-B became final on September 16, 1993.

Defendants acted in concert with the Levy Defendants, filed non-conforming attempts at "oppositions," "writs of attachment" and "liens" in D.C. # 85-1719-B -- which was on appeal -- and did so without the client Fischbach being a party to the case or having any judgment, and conspired with Brewster, his law clerk and Levy Defendants to interfere with release of the Petitioner's property from the federal registry -- after Levy's Local Union clients lost their appeal of jury verdicts for Petitioner.

Brewster did not order Defendants to stop filing documents until September 28, 1993, but filed that order *nunc pro tunc* to July, 1883 (App. 53). Defendants resumed their blizzard after September 15, 1993 issuance of the appeal court's final mandate.

Throughout all filings, Defendants constantly communicated with Brewster, Lowe (despite a sham order prohibiting contacts) and the Levy Defendants, constantly misrepresented to Petitioner and Defendants that Fischbach had "liens" and had filed "writs," and conspired with them to seize Petitioner's property.

All acts constituting fraud and conspiracy and supporting other claims were articulated and supported in Petitioner's complaint, and his Oppositions to motions to dismiss, including transcripts of hearings. The appeal court dishonestly held Petitioner "failed to produce sufficient evidence" to support claims, but discovery had been "stayed" and he filed F.R.Civ.P Rule 56(f) declarations showing summary judgment was premature. Failure to afford a party reasonable opportunity to conduct discovery is grounds for reversal. *Costello, et al, v. Providers Fidelity Life Ins. Co.*, 958 F.2d 836 (8th Cir. 1992); *Contractors Ass'n of E.Pa., Inc. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir. 1991); *Emmons v. McLaughlin*, 874 F.2d 351 (6th Cir. 1989).

The doctrine of "issue preclusion" couldn't support grants of summary judgment when "prior judgment" was an order denying a petition for writ of mandamus or an appeal. Respondents were not sued before for claims sued for here. Only final judgment on the "merits" of an action would preclude litigating these issues. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424 (1981), citing *Commissioner v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-353, 24 L.Ed. 195 (1877).

III.

This petition should be granted because the district court's grant of summary judgment in Petitioner's suit against the judge's co-conspiring attorneys -- for Union Defendants whom Petitioner had gotten jury verdicts and judgment against before that judge in two separate suits -- also overstepped boundaries of accepted procedure, and the granting of summary judgment and the appeal court's affirmation of that summary judgment departed from the usual course of judicial proceedings, conflicted with applicable decisions of this court, and require exercise of this Court's powers of supervision.

Levy Defendants and Brewster misrepresented for months that Petitioner's appeal from D.C. # 85-1719-B was consolidated with Local and Parent Union losing appeals (App. 100-113), and that Brewster ordered them to designate the entire transcript, but the record shows only the Unions' appeals were consolidated and that Levy voluntarily ordered the transcript. Levy had fraudulently misrepresented that the Local Union incurred transcript costs in Petitioner's appeal, where no transcript was designated (105-08). Transcript costs should have been split between the Union parties under F.R.App.P. 10 and Circuit Rule 10-3 (App. 41-44). They had the appellant's burden "to print all of the evidence, good and bad, material to the point [on appeal]." *Chernak v. Radio*, 331 F.2d 170, 171 (1st Cir. 1964), quoted in *Hayes v. Consolidated Service Corp.*, 517 F.2d 564 (1st Cir. 1975).

Brewster and Levy misrepresented that Petitioner was liable for costs for citing from a district court transcript (App. 108-113). Levy always possessed the transcript, and Petitioner never possessed it, and he cannot be charged for citing to the court's transcripts. *U.S. v. Benning*, 295 F.2d 705 (9th Cir. 1961).

Brewster and Levy misrepresented costs were awarded to the Local on April 14, 1993, before their petitions for rehearing were denied on August 30, 1993. The Clerk had no jurisdiction to hear a bill of costs months before a September 16, 1993 final mandate issued, and filed no order or F.R.Civ.P. 54 judgment. Brewster did not have the power to suspend what a majority of the judges have required. Wright & Miller, *Federal Practice and Procedure*: Civil § 3152, citing *Spangler v. Atchison, T. &*

S.F.R. Co., C.C.D. Mo. 1890, 42 F. 305.

The appeal court decision that the propriety of the "offset" of $14,148.75 in trial transcript costs had been litigated and decided in Petitioner's appeal from Brewster's award is error because that was not litigation on the merits of claims that Brewster, Hendrix and Levy conspired to seize Petitioner's property via that award. That award did not exist before December 15, 1993. Defendants seized the property as of September 16, 1993. That appeal court erred by relying on *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988). Claims must be "actually decided" after a "full and fair opportunity" for litigation. *Id.* Petitioner had no opportunity to present these claims before this lawsuit.

Levy Defendants' clients did not file any equitable action, motion or counterclaim for a judgment or right to offset costs against the prevailing Petitioner (it was precluded by appeal court denial of those costs). The Union clients were not entitled to set-offs as per F.R.Civ.P. 69(a) because no claim was made against his judgment under California law, and he must have notice of a claim and due process. *Kruger v. Wells Fargo Bank*, 11 Cal.3d 352 (1974), citing *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972). Due process includes the right to notice and the opportunity to be heard at a meaningful time in a meaningful manner. U.S.C.A. Amend.5.

CONCLUSION

Defendants violated Petitioner's Fifth Amendment rights via conspiracy and fraud. Even if district and appeal court statements he didn't plead claims specifically were true, *pro se* pleadings are held to a less stringent standard, and he should get an opportunity to overcome deficiencies. *Gillespie v. Civiletti*, 629 F.2d, at 640 (9th Cir. 1980), citing *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1972). As the draftsmen of the Federal Rules explained: "In the final analysis a court has the responsibility to do justice between man and man, and general principles cannot justify denial of a fair day in court ...." *Gill v. Stolow*, 240 F.2d 669, 670 (2nd Cir. 1957) (per CLARK, J.).

Dated: 12-19-1996

Lawrence Moore

Lawrence Moore

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CIRCUIT RULE 10-3 ORDERING THE TRANSCRIPT

10-3.1(a) Notice of Appellant of Transcript Portions to be Ordered: Unless counsel have agreed on transcript portions to be ordered, within 10 days after the notice of appeal is filed, the appellant shall serve on the appellee a notice setting forth the portions of the transcript the appellant shall serve on the appellee a notice setting forth the portions of the transcript the appellant will order from the court reporter. If no transcript is needed, the appellant shall file in the district court and serve on the appellee a notice so stating, and at the same time shall provide a copy of this notice to the court reporter and to the Court of Appeals.

(b) Notice By Appellee of Additional Transcript Portions to be Ordered: Within 10 days after the date of service on the appellee of the appellant's notice of transcript portions to be ordered, the appellee may serve on the appellant a notice setting forth additional portions of the transcript, if any, necessary for the appeal.

(c) Ordering the Transcript: Within 10 days after the date of service of the appellee's notice of additional transcript portions or, if appellee does not timely serve such notice, within thirty days after the notice of appeal is filed in the district court, the appellant shall file a Transcript Designation and Order Form .... Appellant shall order all transcript portions designated by both the appellant and the appellee.

(d) Payment for Transcript: On or before the date the Transcript Order Form is filed with the district court, the appellant shall make suitable arrangements with the court reporter for payment of the cost of the transcript .... It is the appellant's obligation to pay for the original transcript.

10-3.3 Whenever the appellee serves notice upon the appellant that additional portions of the transcript are required under Circuit Rule 10-3.1(b) or 10-3.2(c), the appellant shall be responsible for payment unless the appellant certifies that the requested portion is not necessary to the appeal, stating the reasons therefor. After such a certificate is served and filed in the district court, and copies are furnished to the Court of Appeals and the court reporter(s), the district court shall determine the allocation of costs.

UNITED STATES DISTRICT COURT FOR

THE SOUTHERN DISTRICT OF CALIFORNIA

LOCAL RULES

265-1. In General.* (L.R. 54.1.a.) See 28 U.S.C. 1920 and 1923; Rule 54(d) F.R.Civ.P. Unless otherwise ordered by the court the prevailing party shall be entitled to costs. The party in whose favor a judgment or decree for costs is awarded or allowed by law, and who claims his costs, shall, after verdict, or after the making of an order for judgment or decree, serve on the attorney for the adverse party and file with the clerk (such service and filing in no event to be later that five (5) days after notice of the entry of the decree or judgment) his bill of costs and disbursements, together with a notice when application will be made to the clerk to tax same.

265-13. Party Entitled to costs* (LR 54.1.1.)

The determination of the prevailing party shall be within the discretion of the court in all cases except where such determination is inconsistent with statute or the F.R.Civ.P. or the rules of the appellate courts. If each party recovers in part, ordinarily the party recovering the larger sum will be considered the prevailing party. The defendant is the prevailing party upon a dismissal or summary judgment or other termination of the case without judgment for the plaintiff on the merits.

265.18. Appellate Costs* (L.R. 54.1.q.)

The District Court does not tax or re-tax appellate costs. The certified copy of the judgment or the mandate of the court of Appeals, without further act by the district Court is sufficient basis for issuance by the Clerk of the District Court of a writ of execution to recover costs taxed by the appellate court.

* No change in January 1, 1992 amendments.

California Code of Civil Procedure § 1710.50. Stay of enforcement

(a) The court shall grant a stay of enforcement where:

(3) The judgment debtor has made a motion to vacate pursuant to § 1710.40. Under this paragraph, enforcement shall be stayed until the judgment debtor's motion to vacate is determined.

C.C.P. § 697.040. Stay of enforcement of judgment

(a) If enforcement of the judgment is stayed on appeal by the giving of a sufficient undertaking under Chapter 2 (commencing with Section 916) of Title 13:

(1) Existing liens created under this division are extinguished.

(2) New liens may not be created under this division during the period of the stay.

(b) Unless the court otherwise expressly orders, a stay of enforcement of the judgment under Section 918 does not extinguish or prevent the creation of a lien under Article 2 (commencing with Section 697.310) or Article 3 (commencing with Section 697.510); but, unless the court otherwise expressly orders, no other liens may be created or continued under this division during the period of stay of enforcement.

(c) Unless the court expressly orders otherwise, if enforcement of the judgment is stayed pursuant to Section 1699 or 1710.50:

(1) Existing liens created under this division are extinguished.

(2) New liens may not be created under this division during the period of the stay.

C.C.P. § 708.460. Statement concerning lien endorsed on judgment; inclusion in abstract

(a) If a lien is created pursuant to this article, the court clerk shall endorse upon the judgment recovered in the action or special proceeding a statement of the existence of the lien and the time it was created.

(b) Any abstract issued upon the judgment shall include a statement of the lien in favor of the judgment creditor.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 85-1719-B

AMENDED JUDGMENT ON SPECIAL VERDICT

Filed March 21, 1990

This case came on regularly for trial before a jury on October 3, 1989, and on December 18, 1989, the jury rendered its verdict. Therefore, it is ordered, adjudged, and decreed as follows:

On the first cause of action, plaintiff shall recover from defendant International Brotherhood of Electrical Workers, Local 569 ("Local 569") the amount of $43,156.31.

On the second cause of action, plaintiff shall recover jointly and severably from defendants Local 569, Heisler, and Flowers the amount of $1,000.00. The plaintiff shall also recover punitive damages in the amount of $10,000.00 from Local 569, $5,000.00 from defendant Heisler, and $2,500.00 from defendant Flowers.

On the third cause of action, plaintiff shall recover damages in the amount of $500.00 jointly and severably from defendants Local 569, Heisler, and Flowers, and punitive damages in the amount of $1,000.00 from defendant Flowers.

On the fourth cause of action, plaintiff shall recover damages in the amount of $500.00 jointly and severably from defendants Local 569, Heisler, and Flowers, and punitive damages in the amount of $2,500.00 against defendant Flowers.

IT IS SO ORDERED.

FILED: MAR 21 1990

RUDI M. BREWSTER
DISTRICT JUDGE

MINUTES OF THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Lawrence Moore vs. Local 569 of the IBEW
No. 85-1719-B
Clerk: William W. Luddy

	Attorneys
Plaintiff	Defendants
Pro per	Ed Levy Local 569

PROCEEDINGS: TAXING OF COSTS

Filed Defendant's objection. Cost discussed. Matter submitted pending preparation of Judgment by court and entry thereof.

3-08-90 Judgment having been entered, costs are taxed as follows:

Defendant's objection to clerk fee is sustained and cost is allowed in the amount of $60.00.

Defendant's objection to service fee is sustained. Only the service of the process, summons and complaint is allowable under Title 28, Section 1920. Cost allowed in sum of $45.00.

Defendant's objection to Court Reporter fees for transcripts is sustained pursuant to Local Rule 265-4 and cost disallowed. As to witness fees, defendant's objection to subsistence is overruled. The established subsistence allowance for this District is $101.00 per day.

Defendant's objection to the fees of Bill Chadwick was not called as a witness and was in attendance in Court although the Court ordered witnesses excluded.

Pursuant to Local Rule 265-4 Defendant's objection to fee for professional service by Robert Wallace is sustained and cost disallowed.

Total witness fees are taxed in the sum of $1,664.26.

Fees for copies, etc. are disallowed. Although binders of exhibits were provided to jurors and exhibits offered at trial, it cannot be determined from the billings which costs would be

taxable. Local Rule 265-7 Provides that copies of motions, pleadings, etc. are not taxable.

Defendant's objection to Deposition costs is overruled and cost of $3,028.66 is allowed. Local Rule 265-5 provides deposition costs are taxable whether or not it is taken solely for discovery.

As to the remaining items of costs, postage, parking, legal research, typing, etc. costs are disallowable on ground they are personal office expenses and not allowable as costs.

Total costs are taxed as follows:

Clerks Fees	$ 60.00
Service Fees	$ 45.00
Witness Fees	$1,664.26
Deposition Fees	$3,028.66
TOTAL	$4,797.92

Counsel's attention is called to Local Rule 265-17 which provides in part that motion to re-tax by any party, in accordance with Rule 54(d)Fed.R.Civ.P., and Local Rule 220 shall be served and filed within five (5) days after receipt of the notice of taxing costs.

DATED: March 8, 1990

INITIALS: WWL
Clerk

MINUTES OF THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Lawrence Moore vs. Local 569 of the IBEW
No. 85-1719-B
Clerk: William W. Luddy

	Attorneys
Plaintiff	Defendants
Pro per	Lewis Levy Local 569

PROCEEDINGS: TAXING OF COSTS

3-7-90 Costs discussed. Filed plaintiff's objections to costs. Defendant submitted copies of billings Re Deposition costs. Matter submitted.

3-8-90 Plaintiff's objection to costs on grounds Re prevailing party is overruled. The Court ordered Local 569 recover costs on portion of case.

Plaintiff's objection to fees of Court Reporter is sustained pursuant to Local Rule 265-4, and cost disallowed.

Plaintiff's objection to Depositions costs is overruled and costs allowed.

Costs are hereby taxed in favor of Local 569 in the amount of $2,180.84.

Counsel's attention is called to Local Rule 265-17 which provides in part that motion to re-tax by any party, in accordance with Rule 54(d) Fed.R.Civ.P., and Local Rule 220 shall be served and filed within five (5) days after receipt of the notice of taxing costs.

DATED: March 8, 1990 INITIALS: WWL
Clerk

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 85-1719-B

Transcript of Proceedings Before
Judge Rudi M. Brewster
SAN DIEGO, CALIFORNIA MONDAY, AUG 20, 1990
(Call to order of the Court.)

MR. LEVY: Good morning, your Honor. Lewis Levy of Levy, Goldman & Levy on behalf of IBEW Local 569 and the Local individual Defendants.

MS. MESSERSMITH: Jenifer Messersmith and Terry Yellig for the IBEW.

MR. ALLENBY: Hillyer & Irwin by Norman Allenby on behalf of Fishback.

MR. MOORE: Lawrence Moore appearing for himself.

THE COURT: Well counsel, I've reviewed these voluminous papers. Let's take the trial transcript matter. Mr. Yellig or Ms. Messersmith, you have filed a cross-appeal challenging the discretionary ruling of the Court to deny Rule 11 sanctions.

. . .

But be that as it may, now that you've asked for the Rule 11 sanction ruling to be reversed, the only way that an appellate body could do that would be to say, "Well, was there any evidence in this record which would make the claim colorable against the IBEW?"

And, in my view that's going to require a review of the trial transcript, and that's what Mr. Moore asks you to provide.

All you did was produce the session in which I granted the directed verdict.

I think he's entitled to the record because, see, his defense to your Rule 11 motion is, "Hey. there were facts; there were claims; there was witness (sic); there was evidence." He'll probably say, "I disagreed with the judge when he granted IBEW's directed verdict, but I'm stuck with that." In fact,

he's appealed that, I believe, has he not?

MR. YELLIG: Without designating any of the record.

THE COURT: Well, maybe he doesn't need it because the Local designated the record on the rest of the case, so its all going to be there, isn't it? Why would he want to designate a record --

MR. YELLIG: Well, he filed a separate appeal.

THE COURT: I know, but they're consolidated.

MR. YELLIG: It's not consolidated .... [T]hey're proceeding as three separate appeals.

MR. LEVY: The Ninth Circuit never consolidated all three of the appeals together, for whatever reason.

THE COURT: How can you have three separate appeals of one case?

MR. MOORE: Because the Defendants have done everything possible to keep it that way, your Honor -- to continue their dilatory tactics in these actions. That's why --

MR. YELLIG: We haven't done anything.

MR. MOORE: These guys originally in their docketing statement assured me that they were going to consolidate and asked me my position, and I said, "Well, I don't have a position on it yet, but I'm not going to oppose it. I presume it's better to go with one appeal."

Later on, Mr. Yellig, because he wanted -- didn't want me to have access to the transcript that Levy had designated, he made a motion to consolidate his with me, but told Levy not to consolidate with me so that I couldn't get the use of the transcript.

MR. YELLIG: That's correct, your Honor.

THE COURT: So that's what's going on.

MR. YELLIG: That's correct .... What has happened is that a notice of appeal was filed by Mr. Moore. A separate notice of appeal was filed by Mr. Levy on behalf of the Local Union.

Then I filed a notice of appeal from the Court's denial of my motion on the attorney's fee .... [N]ow Mr. Moore thinks I'm playing games with him .... I filed a notice -- a motion with the Court of Appeals in July to consolidate Mr. Moore's notice of appeal with my case, I did file that.

Now there's a third appeal -- Mr. Levy's. Now, in that instance, Mr. Moore has is -- Mr. Moore has asked the Local Union to designate, again, the entire record, and Mr. Levy agreed to that.

And what Mr. Moore is trying to do, he's trying to somehow sock me with some expenses for this transcript.

THE COURT: Let me ask you this. The Local Union filed a notice of appeal. Don't they have so many days to designate transcripts?

MR. YELLIG: They did.

THE COURT: Didn't you designate?

MR. LEVY: Yes.

THE COURT: Okay. Well, why don't you guys consolidate your appeal -- the record's going to be filed of the whole trial. That moots Mr. Moore's request for IBEW to prepare a transcript. We don't need two transcripts. And, remember, the costs of these transcripts is paid by the losers on the appeal .... And so, If you should lose your appeals, why pay for two transcripts when one will do?

MR. MOORE: That's right, and I've made the position several times that they don't have to include in the transcript any of the proceedings that are -- refer to Mr. Whelan's case, and also I've made the point that Yellig doesn't have to designate the transcript if they consolidate the cases in the motion.

THE COURT: Well, okay. So you agree it would solve a problem if we just had the cases consolidated for appeal?

MR. YELLIG: I have no problem with that.

. . .

THE COURT: But anyway, it sounds to me like the solution for this first deal is that I'm going to deny the motion by Mr. Moore for an order compelling IBEW to prepare transcript without prejudice and on the assumption that there will immediately be caused to be filed a stipulation by all parties consolidating these appeals into one and that the trial transcript will be furnished by the Local.

Okay, that's ruling number one.

MR MOORE: And are they going to be jointly responsible for the costs of the transcript, your Honor?

THE COURT: I don't know. It's not your problem. You're not responsible for it, so you could care less who pays for it.

MR. MOORE: Down the road, though, it may become a major problem.

THE COURT: Well, it doesn't matter who paid for it if you -- if you lose the appeal, you're going to have to reimburse whoever it was.

MR. MOORE: Well, how about if Yellig loses and Levy wins or Yellig wins and Levy loses?

THE COURT: Well, look, Local 569 has designated the transcript and they're going to pay for it because they've designated it. Mr. Yellig didn't designate it.

So it's a cost for Local 569. It'll be on their cost bill, not Mr. Yellig's. It's Levy's cost bill. Isn't that right, Mr. Levy?

MR. LEVY: So far, it is, your Honor, and the unfortunate thing is that it seems that my client is getting saddled with everybody's expenses in this matter.

. . .

THE COURT: Look, that's an issue for downstream. Let's -- like Teddy Kennedy said, "Let's cross that bridge when we get to it."

MR. LEVY: Providing we can navigate the bridge.

THE COURT: It may be that costs should be apportioned among the two of you. That could be, but that's not for today, Okay?

MR. YELLIG: Or the three of us.

THE COURT: Or all three, whatever. But it isn't for today, right?

. . .

(Proceedings concluded.)

I certify that the foregoing is a correct transcript from the electric sound recording of the proceedings in the above-entitled matter.

Mary Lou Rohr
Transcriber

9-20-1990
Date

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 90-55557
90-55558
90-55559
90-56119
D.C. # CV-85-1719-B

ORDER

Before: Beezer, Wiggins and O'Scannlain, Circuit Judges

Filed November 4, 1991

Defendants move to dismiss plaintiff's appeals, No. 90-55557 and No. 90-56119. Defendants argue that 90-55557 should be dismissed pursuant to F.R.App.P. 4(a)(4) because it was filed during the pendency of the court's consideration of certain defendants' motions for a new trial and ... not from a judgment within the meaning of F.R.Civ.P. 54(a) ("Judgment as used in these rules includes a decree and any order from which an appeal lies".) No appeal lies from the judgment entered December 28, 1989 because it is not a final judgment. See 28 U.S.C. 1291. Consequently, plaintiff's appeal filed during the pendency of the court's consideration of defendants' motions is not rendered a nullity by F.R.App.P. 4(a)(4), but rather is a premature appeal cured by the court's subsequent entry of judgment on March 21, 1990. See, In re Eastport Associates, 935 F.2d 1071 (9th Cir. 1991). Defendants' motion to dismiss Appeal No. 90-55557 is denied.

Defendants' motion to dismiss No. 90-56119 is granted. Because judgment became final with the entry of judgment on March 21, 1990, the order entered July 16, 1990 from which this appeal stems is of no effect, leaving the court without jurisdiction. Plaintiff may appeal all issues in No. 90-55557.

Appeal No. 90-55558 and No. 90-55559 are consolidated. The Clerk shall docket them as cross appeals to No. 90-55557.

. . .

These appeals are released from the prebriefing conference program.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 85-1719-B(M)

ORDER RE CERTIFICATE OF NON-NECESSITY AND MOTIONS TO RETAX COSTS

The above referenced matter came on regularly for hearing on August 20, 1990, before the Honorable Rudi M. Brewster. Appearances were made by Plaintiff Lawrence Moore, in propria persona; Lewis n. Levy, Esq., for Defendants Local 569 of the International Brotherhood of Electrical Workers, Joseph Heisler, and Robert Flowers ("Local 569"); and Terry R. Yellig, Esq., for Defendant International Brotherhood of Electrical Workers ("I.B.E.W."). Based upon the briefs submitted by the parties and the oral argument thereon, it is hereby ordered:

. . .

2. Plaintiff Moore's Motion to Retax Costs is denied except as to $403.44 in deposition fees which were omitted by clerical error from previous Orders to Tax Costs. To the extent Defendant Moore seeks costs for Robert Wallace in excess of the $101 per day allowed for expert witnesses, his motion is denied since the court finds no exceptional circumstances which warrant an imposition of these fees as costs.

. . .

5. The court finds that Defendant I.B.E.W.'s Certificate of Non-Necessity need not be considered at this time, since Defendant Local 569 has designated the entire trial transcript for its own appeal. In order to prevent waste, the court orders that the parties use said designated transcript. Should this arrangement prove unmanageable, the court will take the Certificate of Non-Necessity under submission.

IT IS SO ORDERED.

FILED: NOV 06 1990

RUDI M. BREWSTER
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 91-1543-B
Transcript of Proceedings Before
Judge Rudi M. Brewster
SAN DIEGO, CALIFORNIA MONDAY, APR 20, 1992

(Call to order of the Court.)

MR. VAN DER NAT: Ray Van Der Nat representing a number of the Local Union and trustee Defendants.

MR. BROWN: Hillyer & Irwin by Craig Brown and Norman Allenby on behalf of Fischbach & Moore.

MR. MOORE: Lawrence Moore appearing for himself.

. . .

MR. KISSANE: .... Matthew Kissane appearing on behalf of a number of Defendants that haven't already been named.

. . .

THE COURT: .... Now, the first cause of action -- all of the counts thereunder are dismissed without leave to amend .... That's freedom of speech that's being exercised by the people at these meetings, and there is nothing mentioned in those causes of action that violates the Plaintiff's LMRDA rights.

MR. MOORE: Union officers are reading letters that contain physical threats against me and that's not a cause of action, your Honor?

THE COURT: They have freedom of speech .... The Court is not going to police the inside of that meeting. There's a certain abstention doctrine between the courts and the running of labor unions, and every time somebody stands up and says "hello" or "goodbye" to you, you sue them, and I don't have jurisdiction over that, and I'm dismissing the first cause of action without leave to amend -- all four counts.

MR. MOORE: "Hello" or "goodbye" is significantly different than a threat to beat me up.

. . .

(Proceedings concluded.)

Mary Lou Rohr
Transcriber

4-14-1992
Dated

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 91-1543-B
Transcript of Proceedings Before
Judge Rudi M. Brewster
SAN DIEGO, CALIFORNIA MONDAY, AUG 24, 1992
(Call to order of the Court.)

MR. MOORE: Lawrence Moore appearing for himself.

MR. VAN DER NAT: Ray Van Der Nat on behalf of Local 569 and certain other Defendants, your Honor.

MR. BROWN: Hillyer & Irwin by Craig Brown on behalf of Fischbach & Moore.

MR. KISSANE: Matthew Kissane and Melissa Cook for all named Defendants other than Fischbach, Moore and Local.

. . .

THE COURT: I think based on what I said, Mr. Van Der Nat, it doesn't take a rocket scientist to evaluate what you should do on behalf of your client. Mr. Moore is going to have to pay costs and fees to the motion to reconsider which -- if there's any disagreement as to what those fees are going to be, it may take a few days or weeks or months, and nothing's going to happen in this lawsuit in the meantime. And furthermore, there will be no further action in this lawsuit even if those costs are paid -- there still will be no further action in this lawsuit against anybody but the Local and its officers -- the ones who are involved in those transfers, without the prior posting of a $200,000.00 bond. So it's possible you're going to have enough time if you simply walk out of here and do what the Union should have done a year ago.

. . .

Court's in recess.

(Proceedings concluded.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Rebeccca Dudly — Transcriber

9-2-1992 — Dated

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 85-1719-B(M)

ORDER DENYING PLAINTIFF'S EX PARTE APPLICATION TO RELEASE BOND, DENYING PLAINTIFF'S MOTION TO STRIKE, DENYING FISCHBACH & MOORE'S APPLICATION FOR A WRIT OF ATTACHMENT, AND DENYING PLAINTIFF'S SUPPLEMENTAL EX PARTE APPLICATION FOR RELEASE OF BOND

The court is in receipt of plaintiff Moore's ex parte Application for Release of Bond, Moore's request to strike Fischbach & Moore's Opposition, Fischbach & Moore's Application for a Writ of Attachment on the Bond, and Moore's Supplemental ex parte Application for Release of Bond. Upon consideration of the Applications, the Oppositions, and the Reply, Moore's ex parte Application for Release of Bond is denied; Moore's Motion to Strike Fischbach & Moore's Opposition is denied; Fischbach & Moore's Application for a Writ of Attachment is denied' and Moore's Supplemental ex parte Application for Release of Bond is denied. The reasons are set out below.

1. Fischbach & Moore is not a party to this matter though it is a party to other cases before this court involving Mr. Moore. However, since it has filed an Application for a Writ of Attachment on the bond at issue here, the court finds that it has standing to submit the Opposition. The court considers Fischbach & Moore's Opposition in conjunction with the Application for Writ of Attachment. Plaintiff Moore's Motion to Strike the Opposition is denied.

2. A "district court does not regain jurisdiction of the action until the mandate is issued." United States v. Ross, 654 F.2d 612, 616 (9th Cir. 1981). Since this court has not

received a mandate notice nor is it aware that such a notice has been issued, this court does not have jurisdiction over this matter. Accordingly, plaintiff Moore's ex parte Application and Supplemental ex parte Application for Release of Bond and Fischbach & Moore's Application for a Writ of Attachment are denied.

IT IS SO ORDERED.

FILED: JUN 15 1993

RUDI M. BREWSTER
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CA Nos. 90-55557/90-55558/
90-55559/91-55411

ORDER

BEFORE: ALDISERT*, CANBY AND THOMPSON,

FILED AUGUST 30, 1993

A majority of the panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestions for rehearing *en banc*.

The full court has been advised of the suggestions for an *en banc* rehearing, and no judge of the court has requested a vote on the suggestions for rehearing *en banc*.

The petitions for rehearing are denied and the suggestions for rehearing *en banc* are rejected.

---

* The Honorable Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

Office of the Clerk
United States Court of Appeals
for the Ninth Circuit
121 Spear Street, P.O. Box 193939
San Francisco, CA 94105-3939

September 16, 1993

USDC, San Diego
Southern District of California (San Diego)
United States Courthouse
940 Front Street
San Diego, CA 92189

C.A. NO.	TITLE	AGENCY/ D.C. NO.
90-55557	Moore v. IBEW Local 569	CV-85-1719-B
90-55558	Moore v. IBEW Local 569	CV-85-1719-B
90-55559	Moore v. IBEW	CV-85-1719-B
91-55411	Moore v. IBEW Local 569	CV-85-1719-B

Dear Clerk:

The following document(s) in the above listed cause(s) is (are) being sent to you under cover of this letter. counsel are being served with a copy of this letter only.

[X] Certified copy of the Decree of the Court

[ ] Judgment of the National Labor Relations Board

[ ] Certified copy of the Entry of Dismissal

The record on appeal will follow under separate cover.

Please acknowledge receipt on the enclosed copy of this letter.

Very Truly Yours,

Cathy A. Catterson
Clerk of Court
By: Sandra Wong
Deputy Clerk

Enclosure(s)
ALL COUNSEL WITHOUT ENCLOSURES

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 85-1719-B
Civil No. 87-0172-B
Civil No. 91-1543-B

ORDER DENYING FISCHBACH & MOORE'S EX PARTE APPLICATION FOR DELAY OF DISBURSEMENT OF FUNDS AS MOOT NUNC PRO TUNC TO JULY 7, 1993

The court is in receipt of Fischbach & Moore's ex parte Application for Delay of Disbursement of Funds. Upon consideration of the ex parte Application and the Opposition, the Application is DENIED as moot. Because plaintiff Moore's request to release these same funds in Civ. No. 85-1719 was denied, the Application is moot.

IT IS SO ORDERED.

FILED: SEP 28 1993

RUDI M. BREWSTER
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 85-1719-B
87-0172-B
91-1543-B

ORDER REQUIRING ALL PARTIES' COMMUNICATION WITH THE COURT BE IN WRITING ONLY AND SERVED ON OPPOSING COUNSEL

Having received allegations of misrepresentations and miscommunications between law clerks and a party to the above captioned cases, the court hereby orders that as of September 24, 1993, all communication between any party to the above captioned cases and any law clerk or other employee of the chambers of the Honorable Rudi M. Brewster be in writing only. No oral or telephonic communication will be allowed. Written communications may be mailed, faxed or hand delivered to the Clerk's Office on the first floor of the United States Courthouse located at 940 Front Street, San Diego, California, and of course will be served on opposing counsel.

IT IS SO ORDERED.

FILED: SEP 29 1993

RUDI M. BREWSTER
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 87-0172-B

ORDER DENYING PLAINTIFF'S MOTIONS TO AMEND OR ALTER JUDGMENTS AWARDING ATTORNEYS FEES

Plaintiff has filed two motions to amend or alter judgments awarding attorneys fees in the above-entitled action. The first motion, filed on June 22, 1993, asks the court to amend or alter its judgment of June 11, 1993, which grants attorneys fees in the amount of $224,140.01 to defendant Fischbach & Moore, Inc. The second motion, filed on July 6, 1993, asks the court to amend or alter its judgment of June 23, 1993, which grants attorneys fees in the amount of $512.50 to defendant Fischbach & Moore, Inc. Defendants did not file an opposition to either motion. Both motions were scheduled for hearing on September 27, 1993, but upon the court's own motion, were taken under submission and no hearing was held.

As to plaintiff's first motion, and upon consideration of plaintiff's moving papers, the court hereby orders the following:

1. The court affirms its ruling in paragraph No. 1. Therefore, plaintiff's motion to amend the court's order at paragraph No. 1 is DENIED;

2. The court affirms its ruling in paragraph No. 2. Therefore, plaintiff's motion to amend the court's order at paragraph No. 2 is DENIED;

3. The court affirms its ruling in paragraph No. 3. Therefore, plaintiff's motion to amend the court's order at paragraph No. 3 is DENIED;

4. The court affirms its ruling in paragraph No. 4. Therefore, plaintiff's motion to amend the court's order at paragraph No. 4 is DENIED;

5. The court affirms its ruling in paragraph No. 5. Therefore, plaintiff's motion to amend the court's order at

paragraph No. 5 is DENIED;

6. The court affirms its decision confirming the arbitrator's award of attorneys fees and costs. Therefore, plaintiff's request that the court amend its judgment to deny any award of attorneys fees or costs is DENIED.

As to plaintiff's second motion, and upon consideration of plaintiff's moving papers, the court hereby orders the following:

1. The court affirms its ruling in paragraph No. 2. Although the court agrees with plaintiff that the court entered final judgment on March 18, 1992 as to other case defendants, the court finds that it entered a dismissal of and judgment for defendant Fischbach & Moore, Inc. on August 23, 1991. Therefore, plaintiff's motion to amend the court's order at paragraph No. 2 is DENIED;

2. The court affirms its ruling in paragraph No. 3 that plaintiff's motion for leave to amend the complaint was frivolous. Therefore, plaintiff's motion to amend the court's order at paragraph No. 3, lines 27-28, is DENIED;

3. The court affirms its ruling in paragraph No. 3 granting defendant's request for attorneys fees as reasonable. Therefore, plaintiff's motion to amend the court's order at paragraph No. 3, lines 4-7, is DENIED; and

4. The court affirms its decision awarding attorneys fees to defendant Fischbach & Moore, Inc. Plaintiff's request that the court amend its judgment to deny any award of attorneys fees or costs is DENIED.

IT IS SO ORDERED.

FILED: OCT 19 1993

RUDI M. BREWSTER
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

Transcript of Proceedings Before
Judge Rudi M. Brewster
SAN DIEGO, CALIFORNIA MONDAY, NOV 1, 1993
(Call to order of the Court.)

MR. LEVY: Good morning, your Honor. Lewis Levy on behalf of IBEW 569. It's been awhile. Nice to see you again.

THE COURT: Nice to see you, Mr. Levy.

MR. SAYLER: Good morning, your Honor. Steve Sayler for Fishback and Moore (phonetic).

MS. MESSERSMITH: Good morning. Jennifer Messersmith on behalf of the IBEW.

MS. COOK: Good morning, your Honor. Melissa Cook on behalf of the San Diego Electrical Industry Trust Funds.

THE COURT: Good morning.

MR. MOORE: Lawrence Moore appearing on behalf of himself, your Honor.

THE COURT: Good morning, Mr. Moore.

We have at least three motions and we may have some other motions that will have to be resolved this morning.

MR. MOORE: As far as I know, your Honor, there's only one motion here and it's my motion to vacate a judgment on behalf of Fishback and Moore of attorney's fees.

THE COURT: Well, you know, that may be right because the other motion may be moot. I'm not sure. But let's just take it one step at a time and see what we've got.

First of all, you're right. I think the first motion that needs to be talked about is the motion for relief from the judgments awarding attorney's fees to Fishback and Moore.

. . .

MR. MOORE: For clarification, your Honor, we're speaking about case number 87-0172.

THE COURT: I think that's right.

The Court has reviewed -- re-reviewed all the former as well as present papers filed by the Plaintiff and the Court confirms and affirms the conclusions that it made before and denies the motion for relief from the judgments or orders which award attorney's fees to Fishback and Moore.

So, the motion by the Plaintiff for relief from those judgments or orders is denied.

Now, with respect to the motion for Plaintiff's exemption from lien --

MR. MOORE: I don't have a claim for exemption.

THE COURT: Well, maybe not. Let me just get this out and clarify where we are and where we're going.

There was a motion filed by the Plaintiff for exemption from -- what the Plaintiff regarded -- what the Plaintiff referred to as a, quote, "ostensible," close quotes, lien.

When the Plaintiff filed this motion for exemption, Fishback and Moore responded with a motion to withdraw their lien. The Plaintiff asserted in his motion for exemption -- he asserted among other things that the lien wasn't valid anyway.

. . .

MR. MOORE: That's not exactly my argument, your Honor. My argument is they don't have any standing because they're not a creditor, a judgment creditor ....

THE COURT: No, the situation we have at the present time now is that the -- the lien that's been filed by Fishback and Moore is withdrawn. I earlier stayed the judgment for 224 thousand whatever it is. There is no judgment at the present time for the $512.

MR. MOORE: Correct.

THE COURT: I now lift -- the reason I stayed it was because of the pending motion for relief from it. That's why I stayed it. The Plaintiff had filed a motion for relief from it which I hadn't had a chance to read. For that reason I stayed it. Now I rule on it. I'm now lifting the stay.... As of today you will have two judgments with the clerks -- filed with the clerk and served on the parties. That's where you are. You have no lien. You have no written attachment. You have nothing except two judgments as of today.

MR. SAYLER: Your Honor, there is a motion pending and

I was instructed by the clerk from a letter that I received that instead of handling that ex parte, that we need to get a hearing date for that.

THE COURT: For what?

MR. MOORE: Well, it's not pending then, your Honor. He can't say it's pending when it's not pending.

THE COURT: Nothing's pending. I didn't say anything was pending.

. . .

MR. SAYLER: Your Honor, my only confusion is that right now it's the clerk of the Court that is holding money on behalf of the Plaintiff and those are monies that we're trying to get to.

. . .

THE COURT: So, is there anything else I need to do this morning?

MR. MOORE: That's it, your Honor. Thank you very much.

(Pause)

MR. SAYLER: Your Honor, my only confusion then is on the other case, which is the 85 case --

MR. MOORE: There's nothing before us on that your Honor.

MR. SAYLER: And so that you're indicating -- and that was something that Mr. Moore brought up.

MR. MOORE: Your Honor, he can't go on talking. I've got no papers. They served no motion on me.

. . .

THE COURT: Well, the only thing that -- I'm not aware of anything else that's before the Court.

MR. MOORE: Thank you, your Honor.

MR. SAYLER: Your Honor, my only confusion is I was uncertain whether or not there was a request from Mr. Moore to have then monies released from the clerk and I didn't know if that was something --

MR. MOORE: He has no standing to bring that up here, your Honor. It's not before the Court.

MR. SAYLER: There has been --

MR. MOORE: He's not even a Defendant here.

THE COURT: Let him state it, Mr. Moore.

MR. SAYLER: Your Honor, you previously did rule in some papers that we submitted in the 85 case that we did have standing here because of the monies that Mr. Moore was trying to release.

MR. MOORE: I'm going to object to this continuing dialogue in the case.

MR. SAYLER: Mr. Moore, I'm not interrupting you.

THE COURT: Let him address the Court.

MR. SAYLER: It's my understanding that there have been papers submitted directly to this Court, and not on a motion basis, and I'm trying to get clarification as to what the status of that particular event would be.

If this isn't the proper forum, that's fine, but I do understand that there had been papers submitted to the Court and I did file some opposition papers to try to prevent the release of monies from the clerk.

MR. MOORE: That's the most nebulous --

THE COURT: Didn't you file a lien on that?

MR. MOORE: No, he didn't, your Honor.

MR. SAYLER: Well, we did, your Honor, but because of the fact that we were uncertain if we had the final judgment, then we did have to release our lien. That's why we're filing a writ of attachment just to indicate to the Court that we did have an interest in those monies, but because of our uncertainty about the status of the judgment we then did withdraw the lien.

Now we're going to be refiling the lien today based upon the Court's representation that we do have a judgment, but I'm just trying to make absolutely certain that no monies get released in the interim until we can get the papers back on file this afternoon.

MR. MOORE: Again, bridges over into a case that's not before the Court, that he has no standing to bring up.

THE COURT: Well, there's nothing I can do at the present time. I have nothing before me. There's no lien before me. It's been withdrawn.

. . .

MR. SAYLER: Your Honor, if I can just get a

representation that there is nothing pending before the Court whereby monies are going to be released to Mr. Moore, then I don't have a concern today, but is was my understanding that there had been some motions submitted by Mr. Moore trying to get release of those monies from the clerk. That is my only concern right now.

THE COURT: You know, as I recall -- as I recall, the money that's in the hands of the clerk is stayed. That's my recollection. There is a stay on that money .... And I'm not sure what causes the stay on that. I'm not sure what it is. It's either a lien. What else could it be if it isn't a lien or a writ of attachment?

MR. MOORE: Nothing, your Honor. You said you were going to stay release of the money until you made this decision today. There was no lien.

THE COURT: I'm not aware -- in the law I'm not aware of any other way that this Court could stay the disbursement of the fund, $70,000, in the absence of either a writ or a lien.

MR. MOORE: Me neither, your Honor, and, as you know, I've taken steps along those lines that I was forced to take because there was no basis for that action.

THE COURT: So, if you withdrew your lien, and if that's the only thing that was against it, then, as far as I know, there isn't any lien against that money.

MR. SAYLER: Okay. Well, your Honor, that's why we had also then filed a motion for a writ of attachment because of the uncertainty about whether or not there was a judgment and we were simply trying to --

MR. MOORE: Well, since that's clear, your Honor, can I ask you orally to shoot an order down to the clerk to release that money to me, please?

THE COURT: Well, the concern I have here is that there was a lien filed which froze the funds and then there was a motion filed for relief from the judgment. Then the Court had to stay everything to hear -- to give the Plaintiff his day in court on that.

Then, in the process of doing that, that causes the lien to be evaporated. Then we'd be in a situation where the motion by the Plaintiff, which was unmeritorious, would have the effect

of freeing up the money.

. . .

MS. COOK: Yeah, but, your Honor, Fishback and Moore definitely cares. That's a lot of money to them.

MR. MOORE: Well she's not Fishback and Moore's attorney, your Honor and she has no standing to make any voice here.

MS. COOK: Excuse me, Mr. Moore. My clients also have a lien on this money.

MR. MOORE: And that's another misrepresentation.

THE COURT: I wasn't aware of that. If you've got a lien on the money, then obviously there's a lien on the money.

MR. MOORE: How can everybody come up here and say they have all these liens, your Honor?

THE COURT: I'm not aware -- I mean, I don't know. She's telling me she has a lien.

MS. COOK: I absolutely have a lien on the money. There is a motion Mr. Moore has calendared for November 22nd with regard to that lien. My lien has been on file for several months now, your Honor.

THE COURT: For how much money?

MS. COOK: It's $1,255.

THE COURT: $1,255? Well, if that's true, then maybe that would affect all --

MR. MOORE: Well, let me ask you something specifically from my point of view, your Honor. How does that affect whether or not you're going to send down the order to release the bond? It doesn't affect it at all, right? It has no effect on it.

. . .

THE COURT: It's a lien for $1,200. That wouldn't tie up $70,000.

MR. MOORE: What does that have to do with what's going on here, your Honor, in any case?

MR. SAYLER: Your Honor, it's my understanding that there is currently a motion pending before this Court that I believe is calendared for, what --

MS. COOK: November 22nd.

MR. SAYLER: November 22nd, to have those monies

released. So that's what I'm trying to get clarification on. I've also then filed a motion with this Court --

THE COURT: To have the 70,000 released?

MR. SAYLER: Yes.

MR. MOORE: This is not November 22nd, your Honor. What's he talking about? What are they talking about? None of this is before the Court. I'm being seriously prejudiced here.

THE COURT: If there is a motion on file to release the lien for November whatever, then that's when that will be taken up. I'm not aware of any motion on file to release the lien.

MR. SAYLER: Your Honor, I have submitted some papers for this Court to request that I be able to intervene in that 85 case and that I also then become, basically --

MR. MOORE: Those are not even filed with the Court, your Honor. We've already been through this. They're going over and over the same nonsense here.

. . .

THE COURT: Has Mr. Moore filed a motion?

MR. MOORE: Mr. Moore has no motion.

MR. SAYLER: Your Honor, I understand --

THE COURT: Did you receive a motion?

MR. SAYLER: I did not because I am not a party in that case and I'm out of the loop.

THE COURT: Is there anybody around here who is a party in that case?

MR. LEVY: I am a party to that case, your Honor.

THE COURT: Have you received a motion calendared for November 22nd?

MR. LEVY: I did not bring my entire file down with me, your Honor.

MR. MOORE: I have no motion calendared for November 22nd, your Honor.

MR. LEVY: I believe that Mr. Moore does have a motion on for November 22nd, and I'm not familiar as to what the subject matter of that motion is.

THE COURT: Let me ask my clerk.

MR. MOORE: I calendared a motion that was made moot

by your June 16th order.

(Pause to confer)

THE COURT: 85, that's the --

MR. MOORE: That's correct, your Honor. I can bring all that up, if you want, but it's not before you.

THE COURT: Let me just inquire, did Local 569 -- did Local 569 post a $70,000 bond in case number 85-1719?

MR. LEVY: Yes, we did.

THE COURT: Has that appeal been determined?

MR. LEVY: Yes, it has.

MR. MOORE: Yes, it has, your Honor. The mandate was received by the Court over two months ago.

THE COURT: Well, has Defendant satisfied that judgment?

MR. MOORE: No, they haven't, your Honor.

MR. LEVY: The bond is still sitting with the clerk.

THE COURT: No, I didn't ask about the bond. Has the Defendant satisfied the judgment? The bond, you see, just backs up the Defendant.

MR. LEVY: The judgment has not been satisfied because the proceeds of the bond have not been released towards satisfaction of the ultimate judgment.

MR. MOORE: That's not the only alternative.

MR. LEVY: My understanding was that today we were going to go over the issues of the validity of Fishback's judgment, whether or not that judgment was --

MR. MOORE: Let's try and stay on point, your Honor.

. . .

MR LEVY: My understanding was that we were going to visit the issue of whether or not Fishback's judgment for the attorney's fees in the 87 case was valid and whether or not in light of that judgment the funds which are being held by the Court, which were the supersedeas bond for the appeal in the 85 case would then be released to Fishback as a partial satisfaction of the attorney's fees which they had been awarded in the 87 case.

MR. MOORE: What's the understanding based on, your Honor?

MR. LEVY: Mr. Moore, I don't have to answer to you and I'm not going to answer to you.

In light of the discussion that has gone her, if, in fact, the bond is now ripe for release because there's no lien by Fishback, the mandate has been issued, there's no satisfaction of the judgment, I think we have some other issues that we need to talk about.

Principally, there are some offsets that I believe Local 569 has against that judgment which exists in favor of Mr. Moore.

MR. MOORE: I'm going to ask you to end this hearing, your Honor.

MR. LEVY: Mr. Moore, please.

THE COURT: Just a minute.

MR. LEVY: And that in consideration of those offsets, that certain of the bond monies which are held by the clerk should be released back to Local 569. There are costs which Local 569 has received in the 85 case, as well as previous cases involving Mr. Moore, which have never been satisfied. And those run as a direct offset by my client, a judgment debtor, to Mr. Moore, the judgment creditor.

MS. MESSERSMITH: I would add, if I may for just a moment, your Honor -- I represent the IBEW. We have a cause of issue in the 85 case for $623 that we would also see as an offset to those funds.

THE COURT: Do you have a judgment for that?

MS. MESSERSMITH: We have your order in the 85 case and the appeal has now been received and your order and judgment in that case was affirmed.

. . .

THE COURT: Some Defendants got costs because they prevailed in the 85 case?

Mr. LEVY: That's correct.

. . .

MR. MOORE: [I]t was Local 569, your Honor. You gave them deposition costs for costs -- I deposed the individual [defendants], and then you also gave them the same costs you gave me for the depositions I took. I brought that back several times and it didn't .... I'm going to make a motion that you recuse yourself from considering anything involved with case number 85-1719 right now.

THE COURT: No, that motion is not timely filed and it's

denied.

MR. MOORE: Well, none of this other stuff is timely filed either. It hasn't been filed at all as a matter of fact.

. . .

THE COURT: Now, under those circumstances court costs wouldn't be awarded to those three [losing] Defendants, would they?

. . .

MR. MOORE: I got screwed on those costs, your Honor, and its going to the Supreme Court in a couple of weeks.

. . .

THE COURT: I thought you won that case.

MR. MOORE: That's right. I won that case.

THE COURT: Why are you going to the Supreme Court?

MR. MOORE: You gave them costs of my depositions that I took of their own clients and they were my depositions that I took and the clerk and you gave them the costs .... The Defendant can't get costs for a deposition that the [prevailing] Plaintiff takes.

. . .

THE COURT: So you've got a judgment of costs in the 85 case.

MR. LEVY: That's correct.

THE COURT: Okay. Now, have you filed any kind of a writ of attachment or any kind of a lien on your judgment?

MR. MOORE: No, they haven't.

MR. LEVY: No, we have not.

MS. MESSERSMITH: Excuse me, the IBEW on Friday filed a lien.

. . .

THE COURT: Did you -- did 569 file any lien for its judgment of costs?

MR. LEVY: We did not file a judgment because these costs exist within its own case.

MR. MOORE: The answer is no.

THE COURT: You've got a judgment for costs which was appealed and affirmed by the circuit. You have the judgment for costs. You have to have a judgment because otherwise there would be anything for the circuit to affirm.

MR. LEVY: That is correct. There is also another matter, your Honor.

MR. MOORE: Your Honor, I'm going to object to this entire exchange.

THE COURT: Just a minute.

MR. MOORE: No, your Honor. I can't keep saying -- none of this stuff is before the Court.

THE COURT: It certainly is before the Court. Now let's just calm down. Mr. Lewis, you haven't filed any kind of a lien or a writ of attachment for your judgment in the 85 case?

MR. LEVY: My research indicated that --

THE COURT: Just answer that yes or no.

MR. LEVY: No, I have not, and I will tell you why I haven't.

. . .

THE COURT: If there's no lien -- Mr. Lewis, if there's no lien, the fact that you have a judgment doesn't tie up any money. You can't walk into a department -- you can't walk into a bank, let's say, and show them your judgment and say to the banker, "I've got this judgment so I want you to hold this money." You can't do that.

MR. LEVY: I understand that, your Honor.

MR. MOORE: How come they do it in court?

THE COURT: Just a moment.

MR. MOORE: They get less from the bank than they're getting here this morning.

. . .

THE COURT: At any rate, Mr. Levy, we're down to the situation where your client, Local 569, has -- your client apparently has a judgment in the 85 case, but they have not levied any executions, nor have you liened any money in the clerk's office.

MR. LEVY: We have two separate awards of cost in the 85 case. One, which existed at the District Court level for costs incurred at the District Court with respect to issues that Local 569 -- there is another bill of costs which was entered by the clerk in this matter that related to the transcripts on appeal. They're prorated on the same basis.

THE COURT: Okay.

MR. LEVY: Which is in the amount of $14,148.

THE COURT: Okay.

MR. LEVY: The reason why I did not file a lien or writ of attachment with respect to either of those orders is because my research indicated that where a judgment debtor owes a liquidated sum to a creditor and, in turn, the creditor owes and has been adjudged to owe a liquidated sum to the debtor in that same action, it acts as an offset.

MR. MOORE: Your Honor, can I ask the Court something, please?

THE COURT: Well, you know, you may be right. But I think Mr. Moore has a point here and that is that -- and I don't know this. I mean, nobody has filed any motions and -- the Court doesn't have the vehicle to respond to that in this present forum.

MR. LEVY: I understand and I apologize for that because I was uncertain as to what we were going to be dealing with here today other than Fishback's issues.

. . .

THE COURT: It seems to me that where we are on this thing is -- if you're right that there's an automatic offset, and I don't know that that's right -- I'm not saying it's wrong. I just don't know.

But it seems to me that there's got to be something given to a clerk so that the clerk gets put on notice of something like that. Otherwise, the clerks wouldn't know when to give money and when not to give money.

Therefore, it seems to me that if there's no lien against the fund, then the fund should be released to the owner of the fund if the judgment is final and you've all told me that the judgment is final, except that Mr. Moore is going to make a petition for writ of certiorari, but that doesn't stop the money from flowing.

The only thing that stops the money from flowing is either a writ of attachment or a lien. That's my understanding. That's the only thing that can stop it and at the present time there are two lawyers in this courtroom that have told me that there are liens filed. One is for $1200 or so, and one is for $600 or so.

Mr. Moore tells me we're talking about a fund of $70,000.

MR. MOORE: That's correct your Honor. There are no liens.

THE COURT: So it looks like to me that that money may be tied up to the extent of $1200, plus $600 -- you know, less than $2,000, but I don't know that would tie up the rest of the money.

MR. SAYLER: Your Honor, could I please address that very briefly? There are two things I need to ask this Court.

Since my withdrawal of that lien was done in error, I'd like to then first ask that I be able to rescind my withdrawal because that was done in error. If the Court then denies that --

MR. MOORE: It's gone beyond reason. I'm going to object to this entire thing. This is absolutely nuts for this guy to pull this stuff now.

. . .

THE COURT: Please be quiet. I've let you talk and I want to hear -- everyone has an opportunity to address the Court. They have the opportunity.

The difficulty I have with it is that this is a motion which has to be an unopposed motion and he's not going to stipulate to that, and it could prejudice the Plaintiff by doing that.

. . .

MS. MESSERSMITH: Your Honor, we really didn't get clarification until this morning that, in fact there was a judgment.

. . .

MR. MOORE: For the record your Honor, Ms. Messersmith, when she just said we, she meant Fishback and Moore and she represents the IBEW. So she has no claim on -- no standing to argue on behalf .... So why is she talking on behalf of Fishback and Moore then, your Honor? Can we at last have her shut up on Fishback and Moore's stuff?

. . .

THE COURT: I don't think there's anything else we can do this morning. I feel -- I don't feel that I can grant the motion to rescind your withdrawal because having withdrawn your motion for a lien and serving that withdrawal on Plaintiff, the Plaintiff would have relied on that and now would be in a sense sandbagged by that.

. . .

MR. SAYLER: Your Honor, there are moving papers that were filed with the clerk of the court asking that if this Court was going to be inclined to release any monies tomorrow, that I be given the opportunity to take an emergency writ up to the Ninth Circuit.

So that would be my second request, to at least then have 24 hours to put something together on that.

MR. MOORE: What's he moving now, your Honor? He's making a motion before the Ninth Circuit here in District court?

MR. SAYLER: Your Honor, here's my brand new notice of claim of lien that I.'m handing to Mr. Moore and I will file this with the Court.

MR. MOORE: Now I've got a piece of note paper here that says, "Notice of Lien," no date, just the case number, and his signature on a piece of paper.

THE COURT: Let me say this to you. On the second request -- the second request, which I understand what you're saying, that you are taking an emergency writ to the Ninth, that would be to get a writ as to whether the ruling by the Court on your first request was reversible or not, right?

. . .

MR. SAYLER: Your Honor, here I have a little better one that I resigned and I'll serve on him right now and I'll refile that with the Court in one moment.

. . .

MR. MOORE: I'm going to object to this and I'm going to ask the Court to please stop those individuals from coming over here and serving me with this junk. The proof of service is also dated June 22, 1993. The previous one on the scrap of paper has no proof of service.

. . .

THE COURT: Let's just wrap this up.

MR. MOORE: Okay, your Honor.

THE COURT: Just a minute. The motion that the Court heard this morning was a motion in case number 87-0172-B. It was a motion by the Plaintiff for relief from judgments or orders awarding attorney's fees to Fishback and Moore.

That motion the Court has ruled on and has denied it.

. . .

MR. MOORE: Your Honor, could I request the Court -- while the Defendants are looking for that, could I request the Court to issue the order releasing the bond to me today, to make that order nunc pro tunc to the date of receipt of the mandate of the appellate court, please?

. . .

I'd also like to make the record that Union Defendants and Fishback & Moore are working together over there to produce the phony writs or liens, or whatever, that they're handing me,

. . .

MS. MESSERSMITH: Your Honor, if I could, we received a letter from your clerk dated October 22nd, indicating -- I received a copy of it. It wasn't directed to me. It was directed to Levy, Goldman, and Levy, indicating what would be heard at today's hearing and there are only two items on, not including Mr. Moore's present motion to --

. . .

THE COURT: Just a moment. That's what I thought. The only thing that I see here, that I ever saw here that I had, was a motion for relief from the judgments. I've ruled on that. And a motion for claim of exemption, which, I guess, was mooted by the Defendants withdrawing their lien.

I think that I have ruled on the two matters which were properly noticed for me to rule on this morning and that's really all that I can do this morning. The rest of this has been informational background, but that's all I can do right now.

. . .

The only problem that really is before us right now is what is going to happen to the $70,000 at the clerk's office.

Over the last two or three weeks several parties have submitted papers asking for permission to file motions to prevent the release of the $70,000 in the clerk's office.

I, at that time, instructed my clerks to instruct all parties that I didn't want to do anything with regard to those funds until the attorney's fees issue was resolved. There was a pending motion to resolve whether Plaintiff would get relief from attorney's fees.

I refused to file anything else on behalf of any other parties until I resolved that. My concern is now that the Court, having refused to accept motions to effect that money, may have prejudiced those parties that wanted to file those documents, so that now, having resolved the motions with respect to the attorney's fees, they would find themselves sandbagged and not able to have a hearing on whether they have valid claims against this money because the Court blocked them from having access to the Court.

MR. MOORE: Let me correct the record.

THE COURT: I'm concerned about that.

MR. MOORE: The court hasn't blocked anybody and they haven't filed them, nor could the Court block them from filing them. They've got an absolute right to file them and they're not filed. That's a matter of the record. There's nobody been blocked here. They've called up the clerk within the last week and asked for a motion hearing date. That has nothing to do with my application for release of the bond dated September 13, which was after the writ of mandate, and I'm the only party who has been prejudiced here.

I'm asking you to make the order releasing the bond.

THE COURT: That's a point -- I thing that's a valid point because I remember vaguely receiving that. There have been so many documents. I think I received that and I didn't act on that because of these pending motions. So had I acted on that the funds would have been released then.

. . .

THE COURT: Okay. Gentlemen and ladies, here's what I'm going to do. I appreciate your patience and it's getting late. I'm going to deny Mr. Sayler's request to rescind his withdrawal of the lien because he gave notice of that and I think that Plaintiff, it could be argued, made his position, made his decisions as to what to do, relying on that withdrawal.

I don't think that I could now come around behind him and reinstate it. I think that would prejudice him.

Now, with respect to your second request, that is to stay the bond for an emergency writ to the Court of Appeal, on whatever grounds you feel you have -- here's what I think that

I should do on that.

I should grant the stay for the purpose of taking your writ, but it's with the understanding, that the rights of the parties to that money, the $70,000, will be determined as of their rights as of this moment, which 12:45 p.m. on Monday, November 1, 1993.

. . .

Now, if the Court of Appeal -- if the Court of Appeal affirms these rulings that I've made this morning in your emergency writ, Mr. Sayler, then, since I'm going to send down judgments this afternoon for Fishback and Moore and I'm sure that Mr. Moore is going to go down and request withdrawal of his money -- his request -- I mean, all he's got to do is walk out of here and make his request.

MR. MOORE: Now your Honor, that's not true. I've already done that and they said they have to have an order from you.

THE COURT: Okay. But you've made the request in open court. What I'm trying to say to you is, I think that the rights will flow depending on what the Court of Appeal does.

The Court of Appeal, in other words, it seems to me, will have to find that through some kind of equity or estoppel or whatever, that the Plaintiff should be stayed, then that's going to be the lynch pin that does it.

But if the Court of Appeal affirms, then it seems to me that the only things that are going to stop the money from flowing are those two liens.

. . .

MR. SAYLER: Now, your Honor, what Mr. Moore has been trying to do this morning is then -- he already filed the written application to have those funds released. Now what he's doing today with no notice, an oral argument, is asking the Court to immediately release it when there's something --

MR. MOORE: I am not doing anything today that I have not done for two months, your Honor.

. . .

THE COURT: Is there a motion on file for November 22nd or not?

THE CLERK: Yes, there is. As far as I know, it's a

motion regarding an exemption from a lien.

MR. MOORE: Exemption from a lien, which was mooted by the order --

THE CLERK: There's no hearing date for releasing the bond. I think we should set one.

. . .

THE COURT: Just a minute. Here's what I'm concerned about. I stayed the judgments -- I stayed the judgments. You only have one judgment. The other is an order.

MR. SAYLER: Right.

THE COURT: I stayed that judgment a month or two ago because Mr. Moore filed a motion for relief from those judgments.

MR. MOORE: Correct.

THE COURT: Had I not stayed those judgments, the judgments would have been, presumably, executed on.

MR. SAYLER: Correct.

THE COURT: By staying the judgments, I prevented the Defendants from executing on their judgments. Now, having done that --

MR. MOORE: How did you do that, your Honor? That doesn't follow. How did you do that?

THE COURT: How did I do it? Because you had a motion on file for relief from the judgments. So I said, "In fairness to Mr. Moore, I'm going to hear his motion for relief from the judgments and, therefore, if I don't stay the judgments" --

. . .

MR. MOORE: You stayed my execution on the judgments. You stayed release of the bond.

THE COURT: I have the document right here. It says that the, "Order staying Defendant Fishback and Moore's request for entry of judgment" -- and I said:

"The court has continued Plaintiff's motion for relief from judgments or orders awarding attorney's fees to the Defendant Fishback and Moore until November 1." I said:

> "As the Court has continued until November 1, Defendant Fishback and Moore's request for entry of final judgment in the amount of 224,652.51 is premature. The court hereby

stays Defendant's request pending resolution of Plaintiff's pending motion for relief."

And so had I not stayed the Defendant's motion, they could have executed on the motion, cutting out from underneath Mr. Moore his opportunity to have a hearing on whether the motion -- whether the motion should be granted and the judgment should be vacated.

MR. MOORE: What was the date of that order, your Honor?

(Pause.)

THE COURT: June 23, 1993. It was served on -- on June 22 it was served on all parties, including Lawrence Moore, P.O. Box 84525, San Diego, California, 92138-4525.

At any rate, having done that, I've prevented the Defendants from perfecting their judgment into a levy of execution.

In order to protect Mr. Moore -- you convinced me that now, having done that, preventing you from perfecting your rights in the judgment, I can't -- what I didn't want to do to him, I can't do to you either.

MR. MOORE: What rule is he getting that stay under, your Honor?

THE COURT: What stay?

MR. MOORE: The stay you said you gave him. I don't have a copy of that.

THE COURT: I sent you a copy of it in the mail. I filed the original on June 23.

MR. MOORE: And what case is that in?

THE COURT: Case number 87-0172-B.

MR. MOORE: We're not talking about 87-0172-B here, your Honor.

THE COURT: I understand that, but we're talking about the effect of staying the Defendant's judgment so that you could bring a motion to get ut from under it. Having stayed them so you could bring their motion, now --

MR. MOORE: Hold it now. You're talking about a stay in a completely different case affecting my application for release of the bond in this case?

THE COURT: Your motion this morning is a motion under 87-0172 for relief from the judgment of Fishback and Moore.

I stayed that same judgment on June 23 to permit you to make that motion.

MS. MESSERSMITH: Can we hear the Court's ruling?

MR. MOORE: I've got an application here for release of the bonds in case number 85-1719 that the Court has had since September 13 and today you're giving them a stay.

. . .

And they're not a party to case number 85-1719. They have to perfect any claim against my judgment in 85-1719 through normal channels.

MR. LEVY: Your Honor, in fact, there is an opposition to the release of the funds by Mr. Moore pursuant to his ex parte request of September 13th. On September 18 I filed a document with this Court entitled, "Opposition of Defendants. IBEW Local 569 ex parte motion of Plaintiff Lawrence Moore to release supersedeas bond."

That document basically attaches the bill of costs, which I discussed earlier, and also referenced a third party lien of L&B Electric, who is not represented here at the present time.

MR. MOORE: They opposed my request for release of the bond. What difference does that make?

MR. LEVY: Mr. Moore, please, is it possible to have a human discussion in this courtroom without interruption?

MR. MOORE: I don't think it is because you have no standing to be here in any case. None of you people have any standing to be here on the two motions that the Court has said were before him.

. . .

THE COURT: I think that the ruling has to be -- this is not uncomplicated, at least for the Court. It's not uncomplicated.

The ruling has to be that the only holds on the $70,000 right now are the lien of the trust and IBEW, and the writ, if you have one, would be reversing the court's ruling, not permitting you to reinstate your lien.

Because if your lien is reinstated, then you're protected. That's the lynch pin. It's the reinstatement of the lien. That's the issue that you're aggrieved by.

MR. SAYLER: Right, your Honor. And you recognize that I released it because the order confirming the judgment

was being stayed and so then --

MR. MOORE: You don't know there's any liens --

MS. MESSERSMITH: He's been prejudiced.

. . .

MR. SAYLER: But I didn't have a valid judgment at that point, your Honor.

THE COURT: Yes, you did. That's the thing. You didn't think you did, but you did.

. . .

But the problem is -- the problem is, Mr. Sayler, the Court on its motion has an obligation to life any stay on any public money that belongs to parties if there's nothing against the funds.

I mean, there's no -- the court has no basis to hold a lien on property in the clerk's office unless there's some legal claim against them and the only claims against the funds right now are the two liens which I've identified.

MR. MOORE: Alleged claims, and they were -- there's no evidence that any of those were there on September 13th.

. . .

THE COURT: You've got a judgment right now. I lifted the stay on the judgment this morning. You have a judgment in the clerk's office right now as we speak.

. . .

THE COURT: This afternoon I intend to send the clerk -- let me say this. If you want to take a writ on this, I will stay -- I will file my release of that funds, except for the two liens that are filed against it -- I will file that by 4:00 o'clock. But let me say again, the writ is going to get this affirmed. If my order is affirmed, the rights of the parties flow as of 12:45 today.

If the court is overruled or if it's stayed by the Court of Appeal, let them unsnarl it.

. . .

Court's in recess. I've told you all I can tell you. You've got until 4:00 o'clock.

. . .

MR. SAYLER: Can I not go down right now? I've served him with my notice of lien. Can I not refile it with the Court

now that you've reverified this?

MR. MOORE: Your Honor, he's asking the Court for advice on how to file a lien.

THE COURT: No, I said your rights are as they were as of 12:45. The only relief you can get from this order is to get the circuit to reverse the order of this Court and I'll give you until 4:00 o'clock to get the circuit to stay -- because I won't file these papers until 4:00 o'clock. So you've got until 4:00 o'clock. Because they close at 4:00 o'clock. That's why I'm saying 4:00 o'clock.

MR. SAYLER: Your Honor, I have until -- but, your Honor, by 4:00 o'clock I don't have an opportunity to get to the Ninth Circuit by 4:00 o'clock.

THE COURT: They're right here in this building. The circuit clerk is right downstairs.

MR. SAYLER: I understand. But I can't get my papers together by that point in time, your Honor -- by 4:00 o'clock today.

MR. MOORE: They've got 34 attorneys here.

MS. MESSERSMITH: Your Honor, please be reasonable. You are asking him to walk away from $70,000. I think he deserves some reasonable period of time to get his papers together.

MR. MOORE: That's reasonable? That's emotional, your Honor. That's not reasonable.

MR. SAYLER: Your Honor --

THE COURT: Just a minute. Maybe you're right. The rights are going to vest as of 12:45, so giving you additional time is going to effect the Plaintiff. It only takes the money away for a half day more. So, his rights are vested as of 12:45. So giving you an extra day to bring your writ isn't going to affect his rights at all. His rights vest as of 12:45 today.

If the Court's order is affirmed, the fact that you took an extra day to file the writ isn't going to change anything. So, I'll give you to 4:00 o'clock tomorrow.

. . .

MR. MOORE: Okay. Your Honor, can I ask you how their request to delay your action on releasing that bond to me

as per my September 13, 1993 order got before you today?

THE COURT: Because all the parties are before me in court.

MR. MOORE: And that's it.

THE COURT: The parties are here.

MR. MOORE: So there's no noticed motion or anything.

THE COURT: That's right. Mr. Moore, I don't understand you. I mean, you've won the day. You've won the issue. The money, except for the two liens that were always on file -- my order is that it's yours.

MR. MOORE: I haven't won today. You've said that to me for three years and I don't have a nickel yet.

THE COURT: Well, I can't pay the money. I can just enter the judgments.

MR. LEVY: Your Honor, the issue of the offsets was raised in my opposition to Mr. Moore's ex parte motion of September 13th for release of the bond.

MR. MOORE: What difference does that make?

MR. LEVY: It makes a lot of difference to me and my client.

THE COURT: Well, show my clerks what those papers are so she can get them out -- so she can get our copies of them out. If you had an objection based upon offset, and maybe if under the law you're entitled to offset, that might offset a few hundred dollars more, but you're still only talking --

MR. MOORE: They don't have a lien, your Honor. How can someone --

MR. LEVY: Your Honor, there's approximately $18,000 in costs.

THE COURT: Show them what you filed.

MR. MOORE: That money will be back before you again.

(Proceedings concluded at 1:10 p.m.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Karen Johanson	11-10-93
Transcriber	Date

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 85-1719-B(M)
Civil No. 87-0172-B(M)
Civil No. 91-1543-B(M)

ORDER DENYING PLAINTIFF'S MOTIONS FOR CLAIM OF EXEMPTION FROM [OSTENSIBLE] LIEN; ORDER TO SHOW CAUSE WHY $16,328.84 SHALL NOT BE RELEASED TO PLAINTIFF; ORDER SCHEDULING HEARING DATE FOR NOVEMBER 24, 1993; ORDER RELEASING FUNDS TO PLAINTIFF; ORDER STAYING ORDER RELEASING FUNDS TO PLAINTIFF; AND ORDER CONTINUING HEARING

On November 1, 1993, plaintiff's "Motion for Claim of Exemption from [[Ostensible] Lien" filed by Fischbach & Moore, Inc., was heard before the Honorable Rudi M. Brewster. Lawrence Moore appeared for himself; Steven C. Sayler, Esq., appeared for Fischbach & Moore, Inc. Lewis N. Levy, Melissa W. Cook, and Jennifer T. Messersmith, Esq., also appeared for defendants.

The court hereby makes the following findings and orders:

1. The court finds that on October 21, 1993, defendant Fischbach & Moore, Inc., by its counsel, Steven C. Sayler, executed, served and submitted to the court a notice withdrawing its lien filed in cases no. 85-1719-B(M), 87-0172-B(M), and 91-1543-B(M). As of 12:45 p.m., November 1, 1993, Fischbach & Moore, Inc., does not have a lien filed upon monies due and owing to plaintiff in case no. 85-1719-B(M). Therefore, the court hereby DENIES plaintiff's motion for claim of exemption in all three cases as moot.

2. The clerk of the Court is holding a $70,000 bond posted by defendants Local 569 to stay execution of judgment for plaintiff in case no. 85-1719-B(M). On September 27, 1993, the court spread the mandate from the Ninth Circuit affirming this court's judgment, thereby restoring this court's

jurisdiction. Now, plaintiff's "ex parte motion for an order releasing bond," executed July 13, 1993, is presently before the court.

3. Also before the court is Defendant Local 569's "Opposition of Defendant/Appellee/Cross-Appellee Lawrence Moore for Release of Supersedes Bond," executed and served September 17, 1993. Upon consideration of this opposition, the court finds that an issue exists as to whether Local 569 is entitled to an offset for a total of $16,328.84 which represents $2,180.84 awarded to Local 569 in case no. 85-1719-B(M) on March 1, 1990, and $14,148.00 awarded to Local 569 on appeal of case no. 85-1719-B(M) on April 30, 1993. The court cannot consider as potential offsets the other amounts allegedly owed to said defendant, which are listed in its opposition, as these amounts were awarded in cases other than 85-1719-B(M). Therefore, the court hereby issues this order to show cause why plaintiff Larry Moore should not receive from the $70,000 presently held by the Clerk of the Court the claimed amount of $16,328.84. A hearing is hereby scheduled for November 24, 1993, at 2:30 p.m. in courtroom two. Defendant Local 569 shall serve and file moving papers on or before November 10, 1993; plaintiff shall serve and file opposition papers on or before November 17, 1993; and said defendant shall serve and file a reply on or before November 22, at 12:00 noon and shall submit a courtesy copy to chambers by that time.

4. As to the remaining funds, the court hereby orders that the Clerk of the Court shall release to plaintiff all monies except for those upon which liens existed as of 12:45 p.m., November 1, 1993. However, this order is stayed until the filing date of the court's order resolving all issues heard on November 24, 1993, at 2:30 p.m, in courtroom two.

5. On November 24, 1993, at 2:30 p.m., the court will hold a hearing in courtroom two to determine the existence and validity of any and all liens on the $70,000 fund, to determine to whom and in what amounts the court should disburse such monies, and to make a ruling disbursing such monies. All interested parties are instructed to file and serve moving papers on or before November 16, 1993; plaintiff is instructed to

serve and file an opposition on or before November 22, 1993. Pursuant to Local Rule 67.2:

> Upon entry of a judgment following a court or jury trial, funds on deposit in the registry of the court, shall be disbursed only by order of the court after the time for appeal has expired ....

Under Fed. R. App. P. 4, a party has 30 days within which to file an appeal of a court order. Therefore, once the court enters an order on the issues addressed at the November 24, 1993, hearing, the Clerk of the Court will be unable to release said monies for 30 days. Assuming no appeal is filed and no stay is imposed, however, as the fund is currently held in a certificate of deposit, the bank will not release the fund until its maturity date, which the court understands is on or near the fourth of each month. Therefore, the parties are notified that on or near January 4, 1994, the Clerk of the Court will disburse the $70,000 presently held by the court.

6. The hearing on plaintiff's "Motion for Claim of Exemption from [Ostensible] Lien," which pertains to a notice of lien filed on July 27, 1993, in case no. 91-1543-B(M) by numerous defendants and executed by Melissa Cook, Esq., and is presently scheduled for November 22, 1993, is continued to November 24, 1993, at 2:30 p.m. in courtroom two.

7. Plaintiff has notified the court by a letter written October 25, 1993, that he wishes to obtain a hearing date for a motion to strike documents recently served on him by Fischbach & Moore, Inc., and a motion for claim of exemption from an "ostensible" lien filed by Mark Bennett. If plaintiff still wishes to obtain a hearing date for these motions, the court hereby schedules November 24, 1993, at 2:30 p.m. for these motions as well. Plaintiff shall file and serve his moving papers on or before November 10, 1993; defendants shall serve and file opposition papers on or before November 17, 1993; and plaintiff shall serve and file a reply on or before November 22 at 12:00 noon and shall submit a courtesy copy to chambers by that time.

IT IS SO ORDERED.

FILED: NOV 2 1993

RUDI M. BREWSTER
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 87-0172-B

ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENTS OR ORDERS AWARDING ATTORNEYS FEES TO FISCHBACH & MOORE, INC.; LIFTING STAY; DENYING AS MOOT FISCHBACH & MOORE'S REQUEST FOR 54(b) JUDGMENT; AND JUDGMENT ON ORDER AWARDING FISCHBACH & MOORE 512.50 FOR ATTORNEYS FEES

On November 1, 1993, plaintiff's motion for relief from judgments or orders awarding attorneys fees to Fischbach & Moore, Inc., was heard before the Honorable Rudi M. Brewster. Lawrence Moore appeared for himself; Steven C. Sayler, Esq., appeared for defendant Fischbach & Moore, Inc. Upon consideration of the parties' papers, the court hereby orders the following.

1. Plaintiff's motion for relief is denied;

2. The court's July 21, 1993, order staying the court's June 11, 1993 judgment awarding Fischbach & Moore, Inc. attorneys fees in the amount of $224,140.01, and staying the court's June 23, 1993 order awarding Fischbach & Moore, Inc. attorneys fees in the amount of $512.50, pending resolution of plaintiff's motion for amendment or alteration of the attorneys fees awards is hereby lifted; and

3. Fischbach & Moore, Inc.'s request for entry of 54(b) judgment in the amount of $224,652.61 is DENIED as moot. The court's June 11, 1993 judgment awarding Fischbach & Moore, Inc. attorneys fees in the amount of $224,140.01 explicitly states that it is a judgment.

JUDGMENT

Furthermore, the court hereby enters judgment for Fischbach & Moore, Inc. in the amount of $512.50 for attorneys fees awarded in the court's June 23, 1993 order.

IT IS SO ORDERED.

FILED: NOV 2 1993

RUDI M. BREWSTER
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 85-1719-B(M)
Civil No. 87-0172-B(M)
Civil No. 91-1543-B(M)

ORDER RESCHEDULING HEARING FOR PLAINTIFF'S MOTION FOR CLAIM OF EXEMPTION FROM [OSTENSIBLE] LIEN; AND FILING ORDER NUNC PRO TUNC TO SEPTEMBER 20, 1993

On the court's own motion, the hearing in the above referenced cases, originally scheduled for November 2, 1993, is hereby rescheduled to November 1, 1993, at 10:30 A.M. in courtroom two.

IT IS SO ORDERED.

FILED: NOV 4 1993

RUDI M. BREWSTER
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Transcript of Proceedings Before
Judge Rudi M. Brewster

Case No. 85-1719-B
87-0172-B
91-1543-B

SAN DIEGO, CALIFORNIA WEDNESDAY, DEC 1, 1993
(Call to order of the Court.)

MR. MOORE: Good afternoon, your Honor. Lawrence Moore appearing for himself.

MS. COOK: Good afternoon, your Honor. Melissa Cook appearing on behalf of the San Diego Electrical Pension Trust, the Health and Welfare Trust and other Defendants.

MR. SAYLER: Good afternoon, your Honor. Steve Sayler with the law firm of Hillyer and Irwin (phonetic) on behalf of the Defendant Fischbach and Moore.

. . .

MS. MESSERSMITH: Good afternoon. Jenifer Messersmith on behalf of the IBEW, the International.

MR. LEVY: Good afternoon, your Honor. Lewis Levy on behalf of IBEW 569.

MR. DE LA FLOR: Good afternoon, your Honor. George de la Flor on behalf of myself as a lien claimant.

MR. RAND: Good afternoon, your Honor. Carl Rand on behalf of L & B Electric, a lien claimant.

THE COURT: Good afternoon, ladies and gentlemen.

The Court has reviewed the fairly voluminous moving and responding papers on these various motions that we have to hear this afternoon. The Court has also attempted to obtain what documents the Court doesn't have from the Court of Appeal; in other words, judgments and so forth, and we try to reconstruct, as best we can, what judgments were entered for the purposes of handling these motions.

Preliminary, at the outset, I -- we've received a motion by Mr. Moore to -- for the Court to recuse itself. The Court is not aware of any basis to recuse. The Court has absolutely no bias or prejudice against Mr. Moore. Mr. Moore didn't suggest any legal reason to recuse, and, so, the Court declines the intention to recuse -- he's not aware of any basis to recuse.

. . .

Now, the primary reason for us getting together today is to resolve the issues arising out of case number 85-1719 in which the Plaintiff has a final judgment.

I guess that judgment for a number of liens and -- now a writ has been filed against it, and, so, the Court, in researching the law pertaining to this kind of a situation, has done its best to try and iron out and sort out the various claims of all of the parties to the judgment which Mr. Moore has. And I'm going to state, for all the parties at the outset, what the research that the Court has done, based upon the papers that have been filed and the briefs and the memoranda that have been filed by the parties, plus the independent research that the Court has caused to be done has led the Court tentatively to conclude is what should be done with case number 85-1719.

And I think it would be most orderly to proceed in this fashion because, then, as I lay out what it looks to the Court like what has to be done, then I will turn it over to the parties and -- and if anyone can show the Court where I went off the truck, I'll be happy to hear it, and will rectify it.

So, with respect, first, to the 85 judgment, the date of finality of that judgment is the date when the mandate was spread in this Court, and that date is September 27, 1993. Prior to that time it is a case that is pending, and it is pending until the judgment is final.

Second, the Court of Appeal affirmed the trial court judgment in 85-1719. The Court -- I hope you can write these numbers down -- the Court has recovered the pleadings, the amended judgment in case number 85-1719 on the special verdict. I just initially want to ask Mr. Levy a question. This verdict was against a number of Defendants. How many of them are local?

MR. LEVY: Two other Defendants ... Heisler and Flowers.

. . .

THE COURT: Now, is the Union covering those parties? Did you appeal -- did you appeal for them?

MR. LEVY: Yes. The bond that was posted --

THE COURT: And you put the bond up for them?

MR. LEVY: -- the bond that was posted was intended to cover the entire amount of the judgment.

THE COURT: Okay. That's what I thought, and I was proceeding under that assumption. So, the bond was put up for all three Defendant judgment debtors in 85-1719.

MR. LEVY: That is correct.

THE COURT: Okay. The judgment -- the total judgment -- then, without breaking them out between the various Defendant judgment debtors, the total judgment adds up to $66,156.31. Now, Plaintiff recovered costs on top of that judgment of $4,797.92. I totalled that and I get --

. . .

Now, of course, I have zero recollection because I didn't even set those costs; the clerk did. So I'm going by the clerk records, and they got that from the computer, and that's the number that came out of the computer for the costs to the Plaintiff in 85-1719.

. . .

Well, now, having read this order of November 7th, it appears to the Court that the -- that the clerk's award of costs should be increased by the amount of $403.44.

. . .

Okay. Now, let me recalculate the numbers -- now we've got $4,797.92 plus $403.44; that gives us a cost bill of $5,201.36, and adding that to $66,156.31 gives us $71,357.67, and that's the number that the Court is going to use unless somebody can give me a better number -- that's the number I'm going to use as the judgment of the Plaintiff in case number 85-1719.

Now, the Defendant posted a bond to stay execution to appeal that judgment, and they posted a bond of $70,000, so the bond is shy of the judgment by the amount of $1,357.67.

Now -- so, that's the Plaintiff's judgment.

Now, then, Local 569, in that same case number, recovered judgment of costs for both the trial level and the appellate level, and added together the Court computes the number of $16,328.84 -- is that consistent with your number, Mr. Levy?

MR. LEVY: Yes, your Honor.

THE COURT: All right. And, in addition, a third judgment was entered in the case, and that's a judgment for IBEW in which they recovered a judgment for costs of $626,00 -- is that consistent with your records, Ms. Messer?

MS. MESSERSMITH: Yes.

THE COURT: Okay. So, now, those are the facts with respect to judgments that were obtained in the case.

MR. MOORE: You're asking -- you're including the costs that the Defendants -- Local Union Defendants claim they were awarded on appeal in that number?

THE COURT: I am.

MR. MOORE: Okay.

THE COURT: Trial and appellate both.

Now, let's talk about the law with respect to sorting out these numbers.

MR. MOORE: You're aware, of course, that there's no order on that?

THE COURT: On what?

MR. MOORE: Those appellate costs. There was no such award, in fact, on the appellate costs. Nothing more than a mere allegation on behalf of -- by Mr. Levy.

THE COURT: I thought there was a Court of Appeal judgment for costs --

MR. LEVY: There is --

MR. MOORE: There is no --

THE COURT: -- for costs on appeal.

MR. LEVY: -- there is a bill of costs that was entered by Mr. Hendrix (phonetic), the clerk of this court, on April 29th, I believe, of this year.

THE COURT: Appellate costs?

MR. LEVY: Yes.

MR. MOORE: There was no order and no judgment, I've

never been served with any order or any judgment, and there is none in the record.

THE COURT: Have you got a copy of Judge Hendrix's (sic) order? Do we have a copy of that?

(Pause to confer.)

THE COURT: I have the -- I have a copy of the clerk's April 29, 1993, 2:00 p.m. order taxing the costs on appeal for 569 of $14,148 -- is that the number you have, Mr. Levy?

MR. LEVY: Yes, your Honor.

THE COURT: I also have the trial court signed by a different clerk, William Luddy, because they changed clerks in the interim there, and that's for the sum of $2,180.84 -- is that consistent with your records?

MR. LEVY: Yes, your Honor.

THE COURT: All right. Now, let's --

MR. MOORE: Mr. Luddy issued an order, there was no order or judgment --

THE COURT: This is an order -- this is -- this is what the Court is going -- this is sufficient.

MR. MOORE: Not according to the local rules, though, your Honor.

THE COURT: Well, this is sufficient.

Now, let's go to the law with respect to priorities for distributing this money.

The first level of priority for the judgment of the Plaintiff is under the law, as the Court understands it, those two offsets. And the Offset -- the only party that has an offset to the judgment of Mr. Moore is the Local 569, and that is in the sum of $16,328.84, and that should be allowed as a deduct from the Plaintiff's judgment, and that's the first level of deduction, the offset.

. . .

Sixteen thousand three twenty-eight point eighty-four minus $1,337.67 -- it's complicated -- no, let me withdraw that a little bit -- it's complicated because 569 owes more than $1,337.67 in shortfall; they owe that plus interest from the date of entry of the judgment by the trial court before appeal, and the date -- the entry of the judgment of the trial court was -- I believe it was March 20, 1990. Is that correct, March

20, 1990?

MR. LEVY: Yes.

THE COURT: So, Local 569 owes into the pot $1,337.67 plus interest since March 20, 1990. Now, what interest rate is being used here? Is it eight percent, ten percent, what is it.

MR. LEVY: It would be the -- I believe it would be the Federal funds rate that -- the way the Federal funds rate -- the average that has been in existence since that time because the rates have been consistently decreasing since March of 1990, as the Court is aware.

THE COURT: So, what would that be?

MR. LEVY: I think what you have to do is you have to come up with an average of the beginning rate and the end rate.

THE COURT: What's the end rate? What's today's rate?

MR. LEVY: Probably about three and a quarter percent.

THE COURT: What;s the March, 1990 rate?

MR. LEVY: That I don't know.

MR. MOORE: March 1, your Honor?

THE COURT: March 9 -- March 20, 1990.

MR. MOORE: Eight point three six.

THE COURT: Eight point three six. And what is it today? Do you have a chart that shows what it is today, Mr. Moore?

MR. MOORE: As of October 14th it was 3.38.

THE COURT: Well, the difference is about five, suppose we make it six percent; that's midpoint for the whole period -- does that sound close enough for Government work?

MR. LEVY: Sounds fair.

MR. MOORE: Do you have a compound interest formula there, your Honor?

THE COURT: No, I don't. It isn't compound, it's simple interest -- on judgments this is simple interest; it doesn't get compounded.

Does six percent look to you like it's about in the middle?

MR. MOORE: I -- it seems like --

THE COURT: Is it kind of a straight -- is it kind of a straight line down?

MR. MOORE: -- it seems to be.

THE COURT: Well, I -- why don't we pick six percent.

MR. MOORE: six percent, I think, seems --

THE COURT: That's right smack in the middle.

MR. MOORE: -- that's what the IRS charges unless you deliberately try to fudge, so it sounds reasonable.

THE COURT: Okay. Let's use six percent then. So, that means that Local 569 -- let's see, March 20, 1990, to March 20, 1993, is three years, so we need -- we need six percent --

MR. MOORE: Six percent -- just a second, your Honor, hold it. There -- I've got -- that's not the interest on the money that they should have posted. The money that -- they should have posted the entire bond, and I should get the interest at the rate the other money got.

THE COURT: Do you know how much that is -- how much it's earning?

MR. MOORE: I think it's around 12 or 13 percent.

THE COURT: Does anybody know -- oh, I see the clerk -- do you know what you're earning on your funds in the clerk's office, Mr. Hendrix?

MR. HENDRIX: No, sir.

MR. LEVY: It would have to be --

THE COURT: He's got a point -- he's got a point. If you put the $1,337 in there it would be earning like the $70,000 that is in there now, and that's up to about $84,000. I don't know what it's earning.

(Pause to confer.)

. . .

So, $3,500 times three would be around $11,000, seventy -- and it's about '84, so that's a little over five percent -- it sounds like it's right around six percent.

All right, well, let's go with six percent. So, once again, $1,337 times -- it's earning $80.26 a year, or $240.78. So, $240.78 through March, and March, April, May, June, July, August, September, October, November is about seven months more, so seven -- 60 percent of $30 -- or 60 percent of $80 -- 60 percent of that is $48, so we'll add $48 to $240.78. Two forty seventy-eight plus $48 is $288.78, so we'll add that sum to the $1,337.67. I get $1,626.45 -- is that confirmed? Can you confirm that?

MR. LEVY: That's what I've got, your Honor.

THE COURT: Okay, 16 -- $1,626.45. So, as I was saying, application to this case, it looks to me like Local 569 is entitled to the offset of -- the offset of $1,626.45, or the net sum that the 569 is entitled to of $14,702.39.

. . .

Now, then, the fourth category of claims against the judgment is the levy of execution on the judgment which was filed by Fischbach and Moore and that was filed on November 2 -- let's see, where's counsel for Fischbach and Moore?

. . .

MR. SAYLER: -- I do have liens also filed in the 85 case that weren't addressed, and I don't know if you would like me to bring that up now or later.

THE COURT: Well, later -- let me -- let me just finish my summary of what it appears to this point.

I don't have any extant lien that I'm aware of from Fischbach and Moore. There was a lien filed, but it was withdrawn, and I'm only aware of that one lien by Fischbach and Moore.

MR. SAYLER: I do have a file-stamped copy right in front of me, too, your Honor, but --

THE COURT: Of another lien?

MR. SAYLER: That's correct, your Honor.

THE COURT: When was it filed?

MR. SAYLER: November 1st.

THE COURT: Okay. Well, then, that wouldn't help you because that's after the judgment was entered. So, it wouldn't be a valid statutory lien. You see, judgment was final on September 27th. Statutory lien would have had to have been filed before the judgment was final. So, any lien filed after September 27th would not be a valid statutory lien.

MR. SAYLER: But, now, I do have the lien that was filed June 9th, 1993, but that was the one that was --

THE COURT: That's the one you withdrew?

MR. SAYLER: Well, but it was the one that was really extinguished by statute. When the Court stayed the judgment it automatically extinguished my lien, and, so, that I did not have a lien because of the order of the Court.

So, the fact that I withdrew it was a moot point because it

was, in fact, extinguished by the granting of the stay of my judgment.

THE COURT: Perhaps. Tentatively it appears to me that whether you have a lien dated June of 1993 or a writ of execution dated November 2, 1993, you're in exactly the same boat because you'd be the last lien, and you're in the same position, you're -- with a writ of execution you're still last.

MR. SAYLER: Right.

THE COURT: So, either way you're in the same position. The argument would be whether staying a judgment extinguishes the judgment, and I don't think it does; it just stays it -- the judgment is there, it's just stayed.

MR. SAYLER: Okay. Well, your Honor, I did cite in my moving papers the exact specific codes within the California statutes which specifically state when a judgment has been stayed the lien is extinguished, and that -- that's where I got -- the statute --

THE COURT: Well, let's assume that that's true; it doesn't affect your posture.

MR. SAYLER: Okay.

THE COURT: Because even if I -- even if I were to reinstate your June lien --

MR. SAYLER: I'm in the same --

THE COURT: You're in the same boat; it doesn't help you a bit.

MR. SAYLER: Right.

THE COURT: Now, let me finish the writ of execution analysis.

Fischbach and Moore has filed the only writ of execution. It is a proper filing because it was filed after the judgment became final, which was September 27, 1993 -- the writ was filed November 2. The writ is in the amount of $224,140.01, they allege daily interest of 5514 -- I'm not sure what interest rate you're using on that.

MR. SAYLER: Your Honor, unfortunately I did use the ten percent, which is the California --

THE COURT: You did use ten percent?

MR. SAYLER: Correct. And, so, that would be the improper amount.

THE COURT: Well, we'll -- we'll -- we have to modify the daily interest number because we'll go with six percent throughout.

At any rate, it's academic because your lien of $224,000 is not going to be satisfied by what's left in the -- in the Plaintiff's judgment. So, we will change the interest charge, and it will draw interest -- let's see, that judgment -- did it go final in September 27 with all the rest of them? Is that -- was that appeal involved at the same time?

MR. SAYLER: No -- No. There was --

THE COURT: Is it in a different case?

MR. SAYLER: Correct, your Honor.

THE COURT: And what case was it in?

MR. SAYLER: That, I believe, was the --

MR. MOORE: 87-0172.

THE COURT: And when did that go final?

MR. MOORE: November 1 -- November 1.

MR. SAYLER: It -- right. There was a judgment, I believe, that was entered about -- in June of 1993 confirming that, then there was a motion for reconsideration of that, and then that became final November 1st, 1991.

THE COURT: All right. So, the judgment would draw interest from the date of the -- I mean, your judgment would draw interest from that date, November 1, 1991?

MR. MOORE: That's correct.

THE COURT: Is that it?

MR. SAYLER: Well, would it date back to when it was initially entered in June because the motion for reconsideration was denied?

THE COURT: That's true. I think it would. What was the day it was entered in June?

MR. MOORE: The order staying the judgment didn't say that, your Honor. The judgment was stayed; it didn't say that --

THE COURT: What's the date that the judgment was entered?

MR. SAYLER: Your Honor, I believe that was June 9th, 1993.

THE COURT: All right. I'm going to use June 9. The --

the stay was entered at the request of the Plaintiff to allow the Plaintiff to bring a motion to reconsider, but the Plaintiff cannot, by that motion, prevent the Defendants from accumulating interest on the judgment.

MR. MOORE: So, you're -- let me -- let me understand what you're saying. You're saying the writ of execution goes into effect as of November 1?

THE COURT: No. The writ of execution was not filed until November 2 on this action, but it was a judgment -- it's the judgment we're talking about, not the writ -- we're talking about the judgment. The amount of the judgment was $224,140.01 plus interest at six percent from June 9, 1993.

MR. MOORE: Well, what's the effect on this case -- of that on this case?

THE COURT: It just affects the amount of the writ of execution; it affects the total amount of the writ.

MR. MOORE: No. I mean, what's the effect on the judgment in my case now?

THE COURT: It's a writ -- it's a writ which is a lien against your judgment.

MR. MOORE: But since a writ can't be filed against a judgment in Federal court when it's on appeal -- writs of execution can't be executed in a case that's on appeal.

THE COURT: It wasn't on appeal; it was not filed until two weeks ago. Your case was off of appeal and final on September 27, 1993.

MR. MOORE: No, it's on appeal to the Supreme Court?

THE COURT: To which Supreme Court?

MR. MOORE: The United States Supreme Court.

THE COURT: That doesn't affect it; it's a -- at most it could be a petition for writ of certiorari.

MR. MOORE: right.

THE COURT: Well, that doesn't -- that doesn't stay anything.

Now -- so, therefore, my tentative conclusion is that Fischbach and Moore will be entitled to all of the rest of the judgment, whatever it is, in partial satisfaction of the writ of execution filed by Fischbach and Moore.

MR. MOORE: Fischbach and Moore's was June 21, 1993,

your Honor.

THE COURT: June 21 -- June 21 --

MR. MOORE: Three -- that was the judgment they got.

THE COURT: In 87?

MR. MOORE: Yeah.

MR. SAYLER: Your Honor, I don't have my -- the order in front of me, and, so, if --

THE COURT: That's this year?

MR. MOORE: This year, yes.

MR. SAYLER: I know that it was June, 1993, in that case.

THE COURT: Oh, June -- okay, June what?

MR. MOORE: June 21.

THE COURT: Okay.

MR. SAYLER: So that's correct --

THE COURT: Instead of June 9 -- okay, June 21, okay, we'll go with that.

Now, as I was going to say, that's what it appears to the Court must be done. It appears to the Court that there will be no money for the Plaintiff. It appears to the Court that if we cannot liquidate the amount of the lien -- of the attorneys' lien this afternoon, then what the Court intends to do is to enter an order of distribution of the money. I -- my tentative conclusion is to order the distribution to Local 569 of the sum of $14,702.39, if that's the right number -- is that the right number, Mr. Levy?

MR. LEVY: I believe that's what we got, yes.

THE COURT: Fourteen thousand seven zero two point thirty-nine. And the Court tentatively proposes to leave in the clerk's office the sum of $17,500 -- excuse me -- $18,000 even -- $18,000 -- leave that in the clerk's office to abide the hearing in this Court, or the arbitration award on the attorneys' fee, and that whatever is the award of the arbitrator, or of this Court will be taken out of that fund and given to the attorney. And if it -- if it doesn't use the whole $18,000, the balance that's left in that $18,000 subfund, if you will, will go to Fischbach and Moore to further satisfy their writ of execution.

. . .

All right. Now, any other counsel want to address the Court on the proposed distribution order for these minutes?

MR. MOORE: I'd like to know what the -- what you're basing that offset -- what particular Federal rule that it's based on, your Honor.

THE COURT: It's -- it's an equitable offset, and I don't believe it's statutory, I think it's by case law.

MR. MOORE: And what's your power to do equity in that based on?

THE COURT: Well, there are cases that have established this equitable right, and I'm -- I'm following those cases.

MR. MOORE: give me a case.

(Pause.)

THE COURT: I would suggest that you might look up Eight Witkin, W-I-T-K-I-N, California Procedure Third Section 461, the title, "Enforcement of judgment," and also take a look at CCP Section 431.70.

(Pause.)

THE COURT: Okay, anything else, gentlemen?

MR. LEVY: Your Honor, with respect to the amount of the offset that has been granted to Local 569, in -- in all fairness to Local 569, since interest has been awarded to various amounts of Mr. Moore's overage, of the amount owed to Fischbach and Moore, the amount of the lien to L&B, I believe that it -- it would be equitable to also calculate interest on both the original District Court bill of costs, which was entered March of 1990, as well as the subsequent bill of cost on appeal which was entered in April of 1993. I have done some quick calculations on those using the six-percent interest rate.

THE COURT: I used the date of entry of the judgment, didn't I, September 27, '93?

MR. LEVY: Yes.

THE COURT: For both of you?

MR. LEVY: Well, I think the --

THE COURT: That's when I calculated the interest on the Plaintiff's judgment as well.

MR. LEVY: We went back on the -- the overage or the underage, whichever you want to call it, for $1,337.67, which was -- the total amount of the judgment plus the costs minus the bond left $1,337.67 outstanding. I believe we had

calculated that from the entry of the original judgment in the District Court matter, which was --

THE COURT: Well, the reason I did that -- the reason I did that is because -- because the Defendant had the use of that money, it should have been put up on bond, so they had use of that money, so it's a quasi contractual situation. Had the money been put into the Court to stay execution on the judgment -- in other words, Mr. Moore could have levied an execution on the Union for that overage -- or that -- excuse me -- that underage. And the Union had the use of that money; that's the -- that's the independent reason for applying that interest.

I think -- I think by applying the interest on the judgment that the Plaintiff got as of the date that it was final judgment, which was -- which was September 27, '93, so the question would be -- is that the proper date? Oh, I know what I did, I said that the interest is current, whatever it is, because the money was deposited, and that -- and that money goes to the Plaintiff, so you've been collecting interest on his judgment.

MR. MOORE: Speaking of the proper dates, your Honor, you say the -- the Court of Appeals order went final on the day that you spread the mandate, the 27th, they issued the mandate on the 16th, and the costs were that Mr. -- that the Local 569 Defendants claim to have were awarded on -- in May or June of 1993 -- now, does that seem reasonable?

THE COURT: Whose -- whose costs are you talking about?

MR. MOORE: The costs of the transcripts that Local 569 Defendants claim they were awarded, the costs on appeal for the transcripts. And I pointed out that there was no such order or judgment, and that I never, ever got any such order or judgment, and the ostensible award that they pointed to that you said was valid was four months before the case went final. Now, I've never heard of someone being awarded costs before a case went final.

THE COURT: That's -- that's the way it's normally done -- it comes down to the -- down to the clerk, and the clerk taxes the costs and enters the order for them.

MR. MOORE: What comes down to the clerk?

THE COURT: I'm sorry?

MR. MOORE: What comes down to the clerk?

THE COURT: The remittitur -- it's called a remittitur from the Court of Appeal.

MR. MOORE: But there was nothing filed from the Court of Appeal, you just said that.

THE COURT: The remittitur came down. The remittitur comes down, the court taxes -- the clerk taxes the costs, the remittitur is -- is spread by the District Court, that's called splitting the mandate, and splitting the mandate makes the judgment final, and that happened on September 27th.

MR. MOORE: Right. But the cost award is dated in May or June.

THE COURT: It doesn't matter; it's a valid order for costs. The Court of Appeal ordered -- the Court of Appeal ordered costs to the respondents on appeal. So, whether it had been entered in May or June or on September 27th, the same number would have been here.

. . .

MR. MOORE: There are -- there were four appeals, and I was the only prevailing party on appeal.

THE COURT: No, that's not right. As a matter of fact, wasn't that cost appealed and affirmed by the Court of Appeal?

MR. LEVY: That's correct. And of the 20-some-odd issues on appeal, all of which were affirmed, 16 of those issues were Mr. Moore's.

THE COURT: Now, I'm comfortable with the -- with the costs. Any other counsel? Ms. Messersmith?

. . .

MR. MOORE: You can't execute it on appeal in Federal court when it's on appeal, your Honor.

THE COURT: Yes, you can .... That's the whole purpose of the bond. Had they not posted a $70,000 bond to stop you, you could have collected this judgment right away, but they posted the bond; that's where you're getting your -- that's where the judgment's money is coming from now; it's a bond that they posted to prevent execution on a judgment.

Once the judgment is entered as final -- a judgment by the trial court is entered, it can be executed on even though it's on appeal unless there is a stay, and the only way to get a stay is

by posting a bond. So, if you want the distribution stayed so that you can appeal this judgment that I'm going to enter as a result of today's hearing it's incumbent upon you to post a bond or else the Defendants are entitled to distribution.

MR. MOORE: I think we're talking about different things semantically here. What I'm saying is the Federal court can't enforce the judgment when an appeal is pending; that's what I'm saying. I'm not saying that I can't execute on a judgment. I can execute on a judgment when an appeal is pending, of course. Federal court can't enforce the judgment when an appeal is pending.

. . .

That's 29 USC Section 1963 -- that the Federal court can't enforce a judgment when an appeal is pending.

. . .

THE COURT: Okay, let's see here. I have before me the taxing of costs in the trial of $2,180.84 signed by Mr. Levy, and I have the costs -- taxing of costs on the appeal of $14,148 signed by Mr. Hendrix, the Federal clerk -- court clerk.

MR. MOORE: Right. I was noticed for -- I was served with a bill of costs submitted to the Court of Appeal, but I was not served with a bill of costs in the District Court, I wasn't noticed for the hearing, and no order was issued.

. . .

THE COURT: Wait a minute, I beg your pardon -- just a minute -- the date when the clerk certified it was 4/29/93.

MR. MOORE: And when was the final order of the Court of Appeals? When did you spread the mandate?

THE COURT: September 27th.

MR. MOORE: Okay. Now, I never got any notice of that hearing.

THE COURT: There wasn't any hearing.

MR. MOORE: The notice of the motion to tax the costs before the clerk in this Court in April.

THE COURT: That's done in the clerk's office.

MR. MOORE: Right. I got no notice of it, and I got no order, no judgment, no notice in the mail ever, and it was done four months before you spread the mandate. And, furthermore, the Local 569 Defendants applied for those costs

in my appeal in which no transcripts were ever designated.

THE COURT: Mr. Levy, you signed the declaration of these costs and filed them with the clerk. Was that a document that was served on the other side?

MR. LEVY: Yes, it was served on Mr. Moore. There is a -- in fact, in my reply points in my reply papers there's a declaration from my secretary attesting to the fact --

THE COURT: I don't -- I don't have that in front of me. Do you have that?

MR. LEVY: Yes.

THE COURT: Why don't you show that to Mr. Moore.

MR. MOORE: I've got a copy of that, your Honor, and that's just plain not true. I was served with a copy of the bill of costs that was submitted to the Court of Appeals, not to the District Court.

. . .

MR. LEVY: Mr. Moore was served with the bill of costs.

THE COURT: Do you happen to have -- Mr. Levy, do you happen to have the -- in your file do you have the judgment of the Court of Appeals affirming and awarding costs?

MR. LEVY: No, I don't have that with me, your Honor.

THE COURT: I think that's the document that would probably give Mr. Moore the comfort he's seeking, and he -- I think what he's trying to find is the order by the Court of Appeals that awards costs to the respondents; that's what I think he wants to see.

MR. MOORE: Well, no, no, I know what I received.

. . .

MR. LEVY: First of all, the costs which Local 569 obtained on appeal were obtained pursuant to Federal Rule of Appellate Procedure 38(e), which provides for the taxing of transcripts which were necessary to the resolution of the appeal .... The Federal Rule of Appellate Procedure 39 provides that those costs are taxed in the District Court. Your local rules provide that this District Court will not tax such costs. Therefore, in order to cover my responsibility to my client, I applied for those costs in both the Court of Appeals and in this Court. The bill of costs to the Court of Appeals for the reporters transcripts was rejected because, pursuant to FRAP

39, the Court of Appeals does not tax those types of costs; therefore, I was directed to come to the District Court to tax those costs, which is what I did.

MR. MOORE: That's not so --

THE COURT: And Mr. -- and Mr. Hendrix taxed them.

MR. LEVY: Mr. Hendrix taxed those costs on April 29, 1993.

MR. MOORE: -- he was never directed to come to the District Court, and he never filed me with a copy of the bill of costs --

THE COURT: Did they do that in writing, the Court of Appeal?

MR. LEVY: I was notified by telephone in a conference -- in a telephone conference with the clerk of the -- of the Ninth Circuit.

MR. MOORE: Now, how much is that worth?

THE COURT: Well, the fact is the clerk of the District Court signed the taxing of costs; that's good enough for me.

MR. MOORE: Okay, well -- okay, but let me get the inconsistencies on the record at least. The -- a bill of costs was submitted in appeal number 90-55557, no trial transcripts were --

THE COURT: What's that number? I don't recognize that number.

MR. LEVY: There were three appeals in this matter, which were all consolidated together by the Ninth Circuit, and 95-55557, 55558

THE COURT: Now, is that their number -- is that their number?

MR. MOORE: That's their number.

MR. LEVY: Mr. Moore's - 55557

MR. MOORE: Right. No transcripts were designated in that appeal.

THE COURT: I don't recognize the number. Is that a Court of appeals number?

MR. LEVY: Yes, that's the Court of Appeal number.

THE COURT: Okay.

MR. LEVY: Could I -- there are three Court of Appeals cases all consolidated together, all of which were disposed of

in a single opinion by the Ninth Circuit, which is the reported decision in this case. All of the transcripts --

THE COURT: Now, was there a reported decision in the case?

MR. LEVY: Yes.

THE COURT: And did that decision award costs to the respondents?

MR. LEVY: No.

THE COURT: It's automatic under the Federal rules?

MR. LEVY: Automatic under the Federal rules; that is correct.

MR. MOORE: But no costs -- we all submitted our bills, and no one -- no one -- and he asked for the trial transcript costs in that bill -- he submitted that bill to the Appellate Court.

At the same time, he filed in the District Court, but he didn't serve them on me, they had a hearing down there or something without me being there --

THE COURT: Do you have a proof of service of your -- here's 148 -- here is his cost -- bill of costs that he's filed, and a statement by the Defendant in support of the taxing of costs, and it shows -- it shows proof of service by mail, and it shows that it was served on Lawrence Moore, in pro per, P.O. Box 84525, San Diego, California 92138, is that correct?

MR. MOORE: That's my address, but it was never served on me.

THE COURT: Well, Mr. Moore, I -- every -- every -- almost -- almost everything that's happened in this case it has always been your position at the outset that you never got notice of it. I mean, that's been your standard position.

MR. MOORE: That's not true -- that's not true.

THE COURT: And I -- and I can't buy it in the face of all these declarations of service.

MR. MOORE: That's not true, but that's only one element of what I'm saying. There were three appeals that went up there, and no appeals were -- no transcripts were ever designated in case number 90-55557, which is the case where he applied for trial transcript costs. The transcripts were designated in his own appeal, and in the IBEW's appeal, and

they both lost those cases.

THE COURT: Is Rule 39, is that part of Court of Appeals rules?

MR. LEVY: It's Federal rules of Appellate Procedure. And the specific rule is 39(e).

THE COURT: Okay, I found it. Rule 39, costs -- "Rule 39 of Rules of Appellate Procedure provides, except as otherwise provided by law, if an appeal is dismissed costs shall be taxed against the appellant unless otherwise agreed by the party or awarded by the Court. If a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered. If the judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered. If a judgment is affirmed or reversed in part or is vacated, costs should be allowed only as ordered by the Court."

Was this judgment affirmed all the way down the line?

MR. LEVY: All the way around the judgments were affirmed.

. . .

THE COURT: So, you -- obviously, you used the transcript, so there was a transcript.

MR. MOORE: I didn't have those transcripts, though. I used transcripts that were in the District Court. He's talking about transcripts that he has in his office that he ordered in his own appeal. And, furthermore, I have an explanation in my brief that I cited the transcripts in the wrong places because there were duplicate copies on file because most of the transcripts I used were already on file from -- at trial -- when they ordered them during trial, so that's -- for -- to say that I used the transcripts they had in their office is nonsense. I actually asked the guy to run me off the transcripts at the cost of his copy costs and send them to me, and I paid for them. I used transcripts that are available in the District Court to everybody.

MR. LEVY: The transcripts which were available here were made available by virtue of Local 569 ordering and paying for those transcripts.

MR. MOORE: Well, look, they're part of the public record. If someone goes in there from a newspaper downtown

they have to pay you for using them? That's nonsense. What did you order them for in your appeal if you didn't want people to use them?

. . .

THE COURT: The procedure is that the successful party files the request for costs.

MR. MOORE: Right.

THE COURT: And they serve that request on all parties. I'm satisfied, or I'll make a finding that the Local did that.

MR. MOORE: I understand your position.

THE COURT: Now, let me finish -- let me finish.

MR. MOORE: I'm just trying to make a record.

THE COURT: Wait a minute -- let me finish -- they served and filed their request for costs. And then it provides that if any party shall object to those costs -- it says, "Objections to the bill of costs must be filed within ten days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxing the Court of Appeals for an insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs, and if the mandate has been issued before a final determination of costs, the statement, or any amendment thereof, shall be after the mandate upon request by the clerk of the Court of Appeals to the clerk of the District Court."

Now, let's look at the date in which Mr. Levy served his memorandum of costs. It's dated April 14, and the clerk entered the order taxing costs on April 29. The court takes judicial notice of the fact the clerk entered it after ten days had passed.

So, I find no defect -- I find no defect in the cost bill.

MR. MOORE: I'm not asking you to look for a defect, your Honor. I'm saying something very simple, he's saying that he was awarded -- he applied for costs because I lost my appeal. I designated no -- there were no transcripts designated by anybody in that appeal, he designated the transcripts in his own appeal from the trial -- his own appeal, and he lost that, and he's not entitled to any costs because of that. He can't get costs in my appeal for transcripts he ordered in his own

appeal; that's insane. And, furthermore, you're talking about what the clerk of -- of the Appellate Court will do. If I don't have notice of a hearing, they went down there and had a hearing, and he said that they called up my place and left a notice on the recorder or something, nobody left any notice on my recorder, and I've been months trying to get the clerk to have a hearing on this. I've had no hearing and no opportunity to object to any of those costs.

THE COURT: The statute provides the civil procedure for that, and the procedure wasn't followed, there was nothing filed in opposition to the costs; it doesn't provide for a hearing, it says you have ten days to file written objections .... -- his argument is that you designated -- "you" meaning Local 569 -- designated transcripts in support of their appeal of the Court's judgment against the Defendants; that judgment against the Defendants was affirmed. Now, do you have a document which was filed with the court of Appeals designating a transcript?

. . .

MR. MOORE: -- it's right in there, your Honor. You can just go through the exhibits, the first exhibit is the jury verdict, you don't need to look at that.

You can see his designation where he designates -- he says he's going to appeal 20 issues from trial, and he designates -- designated selective transcripts ... and only after he and the IBEW came into this Court and had certificates of non-necessity and anything else, did they designate the transcripts, and you told -- you wouldn't order the IBEW to designate the transcripts again --

... because you already ordered Local 569 to designate all the transcripts; they had appeal -- Local 569 had appeal number 55558, and IBEW had appeal number 55559 -- those were the only two appeals that any transcripts were designated in. I didn't designate any transcripts because I was appealing questions of law and didn't need them.

The fact that they were later available in the court because they either ordered them at trial or ordered them later doesn't make me liable for any transcripts.

. . .

THE COURT: Did he get a copy of the transcript?

MR. LEVY: Of the transcripts? They were available for his use at the -- at the District Court, a copy was on deposit here.

THE COURT: -- they designated October 3,4,5,6,7, and 11, and then it says, "and all days of trial in above-referenced action."

MR. MOORE: -- that's in their appeal only, not in 55557 that the clerk awarded them costs in.

. . .

MR. MOORE: Here is my transcript designation, your Honor. No transcripts -- the only transcript designation I put in, no transcripts.

MR. LEVY: Because they had already been ordered by Local 569 so there was no need for Mr. Moore to order anything.

. . .

THE COURT: As I recall, I ordered the Union to because you didn't have the money for it, and you said --

MR. MOORE: No, no --

THE COURT: -- you decried poverty, and I ordered the Union to provide them.

MR. MOORE: I didn't plead poverty -- I never pleaded poverty --

I recited FRAP 10(3) which says that when the Appellant designates -- calls them and designates certain selection portions like that, then the Appellee can order them to also designate the parts that the appellee needs to respond; that's FRAP 10(3.3), that has nothing to do with poverty.

THE COURT: The question is, under the law, who pays for it. You can designate it, you can order them to designate the rest, but the question is who pays for the rest isn't solved by FRAP whatever it is.

. . .

MR. MOORE: All three Appellants lost their appeal -- all three appellants lost their appeal.

THE COURT: Well, now, Rule 39 says that if -- the case is affirmed costs are taxed against the appellant, so, everybody who was an appellant -- everybody who was an appellant.

MR. MOORE: There were no transcripts designated in my appeal -- none.

THE COURT: So, the -- the -- does the Court necessarily have to inquire whether the transcript was an appellee expense of the Union on the appellants -- plaintiff appellants appeal, in which case it would be an allowed cost, or is the transcript an appellants cost -- appellant Union's cost on the appeal as to which the appellee plaintiff won? If it's the latter, the appellant eats the costs.

MR. LEVY: Uh-huh. If Mr. Moore had not used that transcript for anything else other than answering the arguments raised by Local 569 in appeal number 90-55558, the latter would be true.

THE COURT: Do you think that's -- do you think that's the inquiry? I am not comfortable with that, and I'll tell you why. How do I know who uses what? I mean, they're not doing it in my presence. What they do in their own bedrooms is their business, and I don't know who's doing what in whose bedroom.

MR. LEVY: But you ordered 569 to designate --

MR. MOORE: That's correct, your Honor. And, furthermore -- just a second please -- if I could point out to the Court that in my appeal I specifically did not designate any transcripts, so I felt very comfortable that I could do my appeal without the transcripts. Whether or not I later used transcripts that were available in the District Court is incidental; that's an emotional appeal. Mr. Levy has talked about transcripts that he has in his office.

THE COURT: Let me tell you -- let me tell you what's running through my mind, and I have to tell you I'm kind of nagged by the futility of what we're doing here because -- because we're not -- I don't see the Plaintiff as helping himself because it looks to me like my ruling has to be that the money is gone.

I mean, he's arguing over who is going to get his money other than him it looks like to me.

So, there's a certain futility, but that doesn't mean we have -- that we have -- we don't have to do it right because we do have to do it right. I mean, that's the whole -- that's the

whole foundation of our judicial system.

I mean, it's like a criminal case where everybody knows that the criminal is dripping-wet guilty like a baby white elephant in the snow, but we still have to give him a due-process trial, right?

So, although it may seem futile, and although it may -- by analogy to a criminal case, the whole world might see somebody commit a crime in front of everybody, you still got to give them a due-process trial, right?

So, the question that's running -- the question that's running through my mind is that let's assume that the Plaintiff didn't appeal at all, and that the Union was the only Appellant and the Plaintiff was the Appellee, and the Union designates for their appeal let's say 20 percent of the transcript, and the Plaintiff moves the Court to order more transcript designated, those costs to have additional transcript abide the outcome of the appeal. In other words, the appellant can be forced to augment the transcript; that's the procedure on appeal.

So, the appellant defendant -- the defendant appellant should have been ordered to augment the transcript and furnish the complete transcript for the appellant as well as the appellee. And even if the appellee didn't even look at the transcript, got no benefit from it at all, if the appellee won the appeal, the defendant appellant would have to eat all of the costs on appeal.

Even though -- even though they were forced to buy more transcripts at the motion of the appellee, they would have to eat the whole cost because they were unsuccessful appellants.

MR. LEVY: Correct.

THE COURT: Now, add to that the plaintiff appellant comes in and he files an appeal against the defendant appellee, and for his appeal he doesn't designate any transcript at all, but when the appellee defendant comes in and they designate part of the transcript, then the appellee now putting on the hat of the appellee, follows the procedure that I just described before, requesting augmentation of the record for the purposes of being an appellee on the appellate defendants appeal.

Now, why would the rule be any different? Why would not the defendant appellant who was unsuccessful in the appeal

have to pay the costs of the transcript, and the plaintiff appellee, who is also a plaintiff appellant, has no costs for the -- for the transcript because as a plaintiff appellant the plaintiff did not designate any transcript, but as a plaintiff appellee the plaintiff appellee moved to have the defendant appellant augment the transcript -- I hope you're with me.

MR. LEVY: My response is that it is inequitable to allow Mr. Moore to come under the guise of an appellee and say, "No, they must order the entire transcript so that I have the ability to respond and answer their appeal," and, yet, have the benefit of those transcripts to raise his very own issues on appeal and support those issues on appeal when those transcripts have been paid for by Local 569.

THE COURT: Let me ask another question -- I don't agree with you on that, but let me ask you another question. I don't think it's unfair to the appellee. He isn't an appellee voluntarily, he's an appellee involuntarily, but you made him an appellee.

MR. LEVY: But he's an appellant voluntarily in his own appeal.

THE COURT: He is -- he is, but you said -- you said that the appellee -- it's unfair to the appellant to let the appellee coast on the appellant, and believe me the appellee is drafted to this medical -- this military service, he wasn't a volunteer --

MR. LEVY: You misunderstand --

THE COURT: -- he was drafted.

MR. LEVY: -- you misunderstand what I said. I didn't say that it's inequitable for him to allow him to use those transcripts to respond to Local 569's appeal; it's inequitable for him to come to this Court and say, "I need those transcripts to reply to Local 569's appeal," when , in reality, what he's using those transcripts for is to support his own appeal in the -- in the 55557 case.

. . .

THE COURT: Well, just a minute, let me -- let me follow up on this. It looks to me like there are two solutions, Mr. Levy. If you are correct that he used, relied on and benefitted from your transcript in pursuing his appellant case, and, therefore, he should, inequity, be required to pay some of the

costs of that, then, if the Court were to adopt that, then would it not be equitable to split the cost of the transcripts between --

MR. MOORE: How did I benefit, your Honor? There's a good question. How did I benefit? I lost that appeal? I didn't benefit at all. I gained no benefit.

MR. LEVY: A split was made already .... I used 80 percent because there were 20 total issues raised on appeal, three raised by 569, one raised by the International, 16 raised by Mr. Moore, 20 into 16 equalled 80 percent; that is the figure that I used.

MR. MOORE: In my appeal no transcripts were designated, which I will gain no benefit from.

THE COURT: I understand how you got 80 percent. Of course, that assumes that all these issues had equal dignity, and I'm not so sure that --

MR. LEVY: Well, in opening brief by Mr. Moore of 50 pages that's stocked full of those references, and --

THE COURT: But -- but if they -- if they aren't of equal dignity the ones that -- that are more -- stronger issues would be the ones that the defendant appellant was urging because you were urging the court of appeal to set aside a $70,000 judgment; that's a biggie.

MR. LEVY: Right.

THE COURT: That issue is a biggie.

MR. MOORE: And who has the transcripts?

THE COURT: And that issue the defendant appellant lost.

MR. MOORE: And who has possession of the transcripts?

THE COURT: Now, there are 16 other issues that the plaintiff appellant raised were more capillary issues, were they not? He wasn't quarrelling the $70,000, he just wanted a judgment against more defendants, didn't he?

MR. MOORE: That's right, your Honor.

THE COURT: He didn't like the idea that Mr. Pridemore and a bunch of other people got out from under him.

MR. LEVY: That's -- the issue was about the dues -- the issue was about his rejection from Baker Electric --

MR. MOORE: How many -- how much transcripts do I need to appeal whether they're immune from suit? That's a pure question of law.

. . .

THE COURT: I'm just pointing out that I don't think that -- I don't think that it's -- it's not a -- it's not an indefensible methodology that you use -- I don't want to be derogatory of it. At least it was an attempt to make an adjustment, and I appreciate that. But, at the same time, I don't know that we could say -- make a per se rule that we counted up all the issues and then just prorate it because some issues -- let's face it, some issues are biggies, and of all the issues you were the ones that had --you were the ones that had the heaviest issues because you were the one that got hit with the judgment, and on all of those you were unsuccessful.

So, I -- I -- while I appreciate your consciousness of the need to a portion, and I commend you for that, I'm not so sure that it should be 80/20, I almost think that maybe it would be more equitable to say 50/50.

MR. MOORE: Who's got the transcripts, your Honor?

THE COURT: I don't care about that because I'm satisfied the transcripts were used by both sides.

MR. MOORE: You're going to charge me for transcripts that are sitting in his office that I never got?

THE COURT: So, here's another question now -- let's ask the next question -- you filed your cost bill in April of 1993. And under the local appellate rules, that Mr. Moore had ten days to object to that cost bill, and there wasn't any objection filed by Mr. Moore.

MR. MOORE: Yes, there was an objection filed in the Ninth Circuit, your Honor, but I never got the one in the District Court. I filed an objection in the Ninth Circuit.

THE COURT: How did it get to the District Court? Did you file it both places?

MR. LEVY: I filed it both places.

MR. MOORE: Did you serve it on him both places?

MR. LEVY: Absolutely.

MR. MOORE: No, he did not.

. . .

THE COURT: So, that's -- now what I'm down to is that there was an opportunity for Mr. Moore to object to costs; he was given notice that the costs would be taxed on April 29,

there wasn't any appearance, the clerk entered the cost bill on April 29, so the cost bill stands.

Now, are there any other issues that we have to decide?

MR. MOORE: The cost bill stands -- now, just a second --

THE COURT: The cost bill stands. In other words, the Court will distribute -- as I earlier indicated, to Local 569 the court will distribute $16,328.84 -- excuse me -- $14,702.39.

Anything else this afternoon?

. . .

MS. COOK: Your Honor, I would just ask that the Court give it some real consideration to putting in some sort of limitations on the filings in these cases; it's so out of --

THE COURT: Ms. Cook, that's difficult to do -- it's easy to say --

MS. COOK: You did a fine job in the 91 case when you set the $200,000 bond requirement before Mr. Moore could go forward; that ended the case.

. . .

THE COURT: Now, the last motion is Fischbach and Moore files a motion claiming that Mr. Moore's filing of a petition for writ of mandate -- mandate -- the Ninth Circuit to divest this Court of jurisdiction. We are unable to find any authority for that argument; that's your argument, Mr. Sayler.

MR. SAYLER: I -- I just had no idea if that did or not; that I was -- at the time that I brought that I just was trying to freeze the money from going to Mr. Moore, and, so, I'll withdraw that.

THE COURT: Well, all right, then I'll record that as withdrawn. I think that's all the motions that were filed -- I think I've dealt with all the motions that were filed. So, I thank you all for your input and assistance, and we'll prepare the orders, and the Court's in recess.

(Proceedings recessed at 4:25 p.m.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Ellen Ruby — Transcriber

10/19/95 — Date

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 85-1719-B

ORDER DISBURSING REGISTRY FUNDS; DENYING PLAINTIFF'S OBJECTIONS TO HEARING DATE; DENYING FISCHBACH'S MOTION TO INTERVENE; DENYING FISCHBACH'S MOTION FOR A STAY; DENYING FISCHBACH'S WRIT OF MANDAMUS ARGUMENT; DENYING 91-1543-B(M) UNION AND TRUST DEFENDANTS' REQUEST FOR SANCTIONS; SCHEDULING HEARING TO DETERMINE AMOUNT OF ATTORNEY'S LIEN; AND DENYING PLAINTIFF'S MOTION FOR COURT TO RECUSE ITSELF

On December 1, 1993, a hearing was held before the Honorable Rudi M. Brewster to determine to whom the court should disburse $70,000 in registry funds, plus interest, which were deposited with the court by Local 569, and to determine other miscellaneous matters, some of which pertain to Cases No. 87-0172-B(M) and 91-1543-B(M). Lawrence Moore appeared for himself; Steven C. Sayler, Esq., appeared for Fischbach & Moore, Inc.; Jennifer T. Messersmith, Esq., appeared for IBEW; Melissa W. Cook, Esq., appeared for the Union and Trusts defendants in Case No. 91-1543-B(M); Lewis N. Levy, Esq., appeared for Local 569, Heisler and flowers; George de la Flor, Esq., appeared for himself; and Karl A. Rand, Esq., appeared for L & B Electric, Inc. This order pertains to Case No. 85-1719-B(M) only; the court has issued separate orders for motions brought at this hearing in Cases No. 87-0172-B(M) and 91-1543-B(M).

Preliminarily, the court notes that plaintiff has submitted an ex parte request for the presiding judge to recuse himself for partiality. The court DENIES plaintiff's motion. The following matters are properly before the court:

I. **Disbursement of Registry Funds**

In its order of November 2, 1993, the court asked all

parties interested in the registry fund to submit motions, and asked Local 569 to show cause why plaintiff should not receive $16, 328.84 in offsets claimed by Local 569. Moving and responding papers were submitted by all parties who appeared at the hearing as stated above.

The court finds that:

A. On March 20, 1990, plaintiff was awarded an amended judgment of $66,156.31 in damages against defendants Local 569, Heisler and Flowers.

B. On March 8, 1990, plaintiff was awarded $4,797.92 in costs against defendants Local 569, Heisler and Flowers.

C. On November 7, 1990, plaintiff was awarded $403.44 in costs against defendants Local 569, Heisler and Flowers.

D. In total, plaintiff recovered a money judgment of $71,357.67 against defendants Local 569, Heisler and Flowers.

E. As a condition of its stay pending appeal, Local 569 posted a $70,000 bond with the court. The funds have been earning interest at the average rate of 6% per annum since March 20, 1990. Local 569 still owes plaintiff an additional $1,357.67 to cover the entire judgment, plus interest on this amount, calculated at 6% per annum. The court calculates interest at $.23 per day ($1,357.67 x .06 divided by 360 days per year) for 1,366 days (March 20, 1990 through the filing date of this order, December 15, 1993).[1]

Total interest is $314.18. Therefore, aside from the $70,000 already posted, Local 569 owes Moore $1,671.85.

F. The court also awarded costs to Local 569 and against plaintiff; $2,180.84 was awarded to Local 569 March 8, 1990, and $14,148 was awarded to Local 569 on April 29, 1993. The court is satisfied that the Clerk of the Court properly awarded Local 569 $14,148 in costs on appeal, as Local 569 timely served plaintiff notice of its bill of costs filed with the district court and plaintiff failed to appear to oppose it.

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[1] The court takes judicial notice that banks commonly use a 360-day year for calculating interest, and adopts this measure in calculating interest for the purposes of this order.

G. In total, Moore owes Local 569 $16,328.84, and Local 569 owes Moore $1,671.85. As Local 569 and Moore are mutual debtors and creditors, equitable offset is an appropriate remedy. See 8 Witkin, California Procedure 3d, Enforcement of Judgment § 461 (1993). Therefore, Moore owes Local 569 a net total of $14,656.99.

H. The court awarded $626 in costs to IBEW on November 6, 1990.

I. The Ninth Circuit affirmed this court's judgment, which became final when this court spread the Ninth Circuit's mandate, on September 27, 1993.

J. In Case No. 86-0407-K(CM), the court awarded $612.57 in costs to L & B Electric, Inc., and against Moore on June 1, 1987, and awarded $102 in costs to L & b Electric Inc., and against Moore on May 12, 1988 -- a total award of $714.57. This case was affirmed on appeal in a judgment entered June 20, 1988.

K. In Case No. 91-1543-B(M), the court awarded $1,255 in attorneys fees to the Union and Trusts defendants and against plaintiff Moore on April 27, 1993.

L. In Case No. No. 87-0172-B(M), the court awarded an attorneys fees judgment of $224,140.01 to Fischbach & Moore, Inc., and against plaintiff Moore on June 11, 1993.

M. Until he withdrew sometime in 1989, George de la Flor, Esq., represented plaintiff in the present action. On October 29, 1988, plaintiff and Mr. de la Flor entered into a contract which specifically provided, "Attorney shall have a lien on any settlement, award, verdict or judgment obtained in this matter." On March 9, 1990, Mr. de la Flor filed a notice of attorney's lien in this action. On November 15, 1993, de la Flor filed a motion for distribution of his lien, claiming that he performed services valued at $17,500 in this action. The court finds the lien to be a valid contractual attorney's lien. However, plaintiff disputes the fee amount. As to fee disputes, De la Flor and Moore's contract provides:

> Any dispute between ATTORNEY and CLIENT as to the reasonable value of ATTORNEY'S services (in the event of withdrawal or discharge) . . . shall be arbitrated under the

provisions of the State Bar Fee Arbitration Program set forth in sections 6200-6206 of the California Business and Professions Code.

Cal. Bus. & Prof. Code § 6200 states, "Arbitration under this article shall be voluntary for a client and shall be mandatory for an attorney if commenced by a client." Therefore, as the arbitration provision of the contract is governed by Cal. Bus. & Prof. Code § 6200 the court finds that plaintiff has the choice whether to arbitrate a fee dispute with Mr. de la Flor. Plaintiff has notified the court that he chooses to litigate this dispute in court. Therefore, the court hereby schedules a hearing for January 7, 1994, at 8:00 a.m. in courtroom two. Plaintiff's opposition shall be served and filed on or before December 15, 1993, at 5:00 p.m. Mr. de la Flor's reply shall be served and filed on or before December 22, 1993, at 5:00 p.m., and may be served on plaintiff by depositing it in the mail on that date.

N. On October 28, 1993, IBEW filed a notice of lien in this action under Cal. Civ. Proc. Code ("CCP") § 708.410. Section 708.410 states:

> (a) A judgment creditor who has a money judgment against a judgment debtor who is a party to a pending action or special proceeding may obtain a lien under this article, to the extent required to satisfy the judgment creditor's money judgment, on both of the following:
> (1) Any cause of action of such judgment debtor for money or property that is the subject of the action or proceeding.
> (2) The rights of such judgment debtor to money or property under any judgment subsequently procured in the action or proceeding.
> (b) To obtain a lien under this article, the judgment creditor shall file a notice of lien and an abstract or certified copy of the judgment creditor's money judgment in the pending action or special proceeding.
> (d) for the purpose of this article, an action or

special proceeding is pending until the time for appeal from the judgment has expired or, if an appeal is filed, until the appeal has been finally determined.

As the appeal in this action was "finally determined" on September 27, 1993, IBEW's lien was filed when the action was no longer pending. Therefore, IBEW's lien in invalid under this section. Furthermore, IBEW is not entitled to an equitable offset because IBEW is not plaintiff's debtor. See 8 Witkin, California Procedure 3d, Enforcement of Judgment § 461.

O. On July 27, 1993, the Union and Trusts defendants in Case No. 91-1543-B(M) filed a notice of lien under CCP § 708.410 in Case No. 91-1543-B(M) for $1,255. As this notice of lien was not filed in the 85-1719-B(M) case, this lien is invalid under CCP § 708.410.

P. On February 1, 1990, L & B Electric, Inc., filed a notice of lien under CCP § 708.410 for $793.77, which it believed represented the principle sum of $714.57 plus interest. The court is satisfied that the lien complies with the requirements of CCP § 708.410 because (1) attached to the lien is a certified copy of the Ninth Circuit's judgment affirming the district court's judgment in that case, as well as copies of L & B's cost awards, and (2) the lien was filed before September 27, 1993, when this action was still pending. As L & B's costs were affirmed on June 20, 1988, the court hereby finds that interest should have been calculated at 6% per annum from that date. The court calculates interest at %.12 per day ($714.57 x .06 divided by 360 days per year) for 2,004 days (June 20, 1988 through the filing date of this order, December 15, 1993). Total interest is $240.48. Therefore, Moore owes L & B Electric, Inc., $955.05.

Q. On June 23, 1993, Fischbach filed an amended notice of lien in this action under CCP § 708.410 for $226,341.01. However, on October 21, 1993, Fischbach withdrew its lien. Therefore, this lien is invalid.

R. On November 1, 1993, Fischbach filed an amended notice of lien under CCP § 708.410. As this lien was filed after September 27, 1993, it is invalid.

S. On November 2, 1993, Fischbach filed a writ of execution with the clerk of the court for $224,140.01 plus interest. The court hereby finds the writ to be a valid execution lien under CCP § 697.710, except for its calculation of interest. The court calculates interest at 6% per annum

from June 11, 1993, or $37.36 per day ($224,140.01 x .06 divided by 360 days per year) for 203 days (June 11, 1993 through the filing date of this order, December 15, 1993). Total interest is $7,584.08. Therefore, as of December 15, 1993, Moore owes Fischbach $231,724.09 under Fischbach's writ of execution.

T. On November 24, 1993, Fischbach filed a notice of judgment lien on personal property under CCP §§ 697.510 and 697.550. Under § 697.530, cash and deposit accounts do not qualify as "personal property." See also Legislative Committee Comment to § 697.530 (Deering 1983). Therefore, this lien is invalid.

U. An attorney's lien which has been created by contract is effective as of the date of the contract and has priority over a § 708.410 lien filed after the date of the contract. Cappa v. F & K Rock & Sand, Inc., 203 Cal.App.3d 172, 174-6 (Cal.Ct.App. 1988); see also Cetenko v. United California Bank, 30 Cal. 3d 528, 530 (Cal. 1982). All else being equal, statutory liens filed on the same property have priority according to the time of their creation, on a first come, first served basis. Cal. Civ. Code § 2897. However, "as between a statutory lien and a right of equitable offset, things are not equal and the offset is given an equitable preference." Salaman v. Bolt, 74 Cal.App.3d 907, 918 (Cal.Ct.App. 1977). It is unclear whether an equitable offset comes before an attorney's lien, but as the $70,000 fund is sufficient to satisfy both Local 569 and Mr. de la Flor's liens, the court declines to state which comes first by law. In the court's discretion, the court treats Local 569's equitable offset as first.

V. Upon consideration of the papers, oral argument thereon and the foregoing discussion, the court hereby disburses the registry funds, in order of priority, as follows:

1. $14,656.99 shall be disbursed to Local 569. The Clerk

of the Court is ordered to remit a check in the amount of $14,656.99 to:

International Brotherhood of Electrical
Workers Local 569
Attention: Thomas Pridemore, Business Manager
215 West Washington Street
San Diego, California 92103

Taxpayer ID # 95-0865952

2. Until further order by the court, the Clerk of the Court is ordered to hold $17,500 in the court registry. This amount shall remain in the court registry pending the court's determination of the amount of Mr. de la Flor's fee on January 7, 1994. The court is not reserving an additional amount for interest on Mr. de la Flor's fee because, as his fee is not yet liquidated, the court cannot calculate interest. Should Mr. de la Flor recover $17,500, the Clerk of the Court shall be ordered to release the remainder to Fischbach & Moore, Inc.

3. $955.05 shall be disbursed to L & B Electric, Inc. The Clerk of the Court is ordered to remit a check in the amount of $955.05 to:

L & B Electric, Inc.
8219 Garfield Avenue
Bell Gardens, California 90201

Taxpayer ID #95-2482867

4. The remainder of the fund (the fund's total balance as of the date of disbursement minus $33,112.04) shall be disbursed to Fischbach & Moore, Inc. The clerk of the Court is ordered to remit a check in this amount to:

The Fischbach Companies
7 Hanover Square
New York, New York 10004

Taxpayer ID #13-0710600

W. The Clerk of the Court shall remit said checks on

January 19, 1994, or as soon as possible thereafter. This 35 day window shall provide the parties time to receive this order and to file an appeal, if any, to the Ninth Circuit before any funds are released.

II. **Objections to the Hearing**

Plaintiff has filed an objection to the court's scheduling hearings in Cases No. 85-1719-B(M), 87-0172-B(M) and 91-1543-B(M) at the same time. The court DENIES the objection.

III. **Sanctions**

The Union and Trusts defendants in Case No. 91-1543-B(M) have requested the court to impose sanctions against plaintiff for filing numerous frivolous pleadings. The court DENIES this request.

IV. **Motion to Intervene**

Fischbach & Moore, Inc., has filed a motion to intervene in this case for the sole purpose of obtaining a writ of attachment. This motion is DENIED as moot.

V. **Motion to Stay Release of Funds**

Fischbach & Moore, Inc., has filed a motion to stay the court's order releasing the registry funds. This motion is DENIED.

VI. **Writ of Mandamus**

Fischbach & Moore, Inc., has notified the court that it believes this court was divested of jurisdiction to disburse the registry funds when plaintiff filed his petition for a writ of mandamus with the Ninth Circuit, seeking to compel this court to disburse the registry funds. The court is not aware of any authority for this proposition, nor has Fischbach cited any to the court. This motion, to the extent it is a motion, is DENIED.

IT IS SO ORDERED.

FILED: DEC 15 1993

RUDI M. BREWSTER
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 85-1719-B(M)

ORDER FILING PLAINTIFF'S MOTION FOR AN ORDER RELEASING BOND NUNC PRO TUNC TO SEPTEMBER 27, 1993

The court has reviewed plaintiff's request for correction of the docket in this case. The court received plaintiff's Ex Parte Notice of Motion and Motion for an Order Releasing Bond on September 13, 1993. The motion was rejected for filing because the court had not yet spread the Ninth Circuit's mandate affirming the district court's judgement and restoring this court's jurisdiction to release the appeal bond. As the court spread the mandate on September 27, 1993, the court hereby orders plaintiff's motion filed nunc pro tunc to September 27, 1993.

IT IS SO ORDERED.

FILED: JAN 7 1994

RUDI M. BREWSTER
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 85-1719-B(M)

ORDER DISBURSING REGISTRY FUNDS TO GEORGE DE LA FLOR AND THE FISCHBACH COMPANIES

In its disbursement order of December 15, 1993, the court ordered the Clerk of the Court to hold $17,500 pending the court's determination of the amount of George de la Flor's attorney's lien. The order stated that should the court determine that Mr. de la Flor is entitled to less than $17,500, the remainder would be disbursed to Fischbach & Moore, Inc. On January 12, 1994, a hearing on Mr. de la Flor's attorney's lien was heard before the Honorable Rudi M. Brewster. Lawrence Moore appeared in pro per; George de la Flor, Esq., appeared for himself.

A. Legal Standards

In California, an attorney does not have a lien on his or her client's judgement by equitable right. Wagner v. Sariotti, 56 Cal. App.2d 693, 697 (Cal.Ct.App. 1943). Under California law, "A lien in favor of an attorney upon the proceeds of a prospective judgement in favor of his client for legal services rendered...may be created either by express contract...or it may be implied if the retainer agreement between the lawyer and client indicates that the former is to look to the judgement for payment of his fee." Cetenko v. United California Bank, 30 Cal. 3d 528, 531 (Cal. 1982) (citations omitted). In most jurisdictions, attorneys are allowed "specific charging liens, " or, equitable rights to satisfy his or her expenses and fees out of the judgment. Witkin Cal. Proc. 3d & 143. However, in California, courts have not yet approved of such liens. Id., see also Isrin v. Superior Court, 63 Cal. 2d 153,157 (Cal. 1965). A contractual attorney's lien survives a discharge or voluntary withdrawal of the attorney from representation. Pearlmutter v. Alexander, 97 Cal.App.3d Supp. 16, 20 (Cal.Ct.App. 1979).

B. Discussion

Upon review of the papers. the court finds that there is no dispute that Mr. de la Flor represented Mr. Moore for two separate periods of time. The first representation period appears to have commenced some time before this case was filed and ceased in 1987. The parties do not agree, however, on whether they signed a written fee agreement for the first representation period. Mr. de la Flor claims that such an agreement existed, but that he no longer has a copy of it. Neither R. de la Flor nor Mr. Moore has submitted a copy of such an agreement to the court.

The second representation period appears to have commenced on October 29, 1988, when Mr. de la Flor and Mr. Moore entered in to a written fee agreement. Mr. de la Flor has submitted a copy of this agreement to the court. The agreement provides, "Attorney shall have a lien on any settlement, award, verdict or judgment obtained in this matter." The court finds that this contract establishes a valid attorney's lien in favor of Mr. de la Flor for fees earned during the second representation period.

Mr. de la Flor has submitted moving papers seeking disbursement of $17,500 in attorneys fees. Of that amount, $12,537.50 reflects fees he claims he earned during the first representation period, and $4,962.50 reflects fees he claims he earned during the second representation period. The court has reviewed billing statements submitted by Mr. de la Flor. Based on these billing statements, the court finds that $4,962.50 represents 66.15 hours at $150 per hour, divided by de la Flor to reflect the amount of time he believes he spent assisting Mr. Moore as opposed to co-plaintiff Walter Whelan.

Under California law, without evidence of an agreement between Mr. de la Flor and Mr. Moore, the court has no authority to disburse funds for attorney's fees Mr. de la Flor claims he earned during the first representation period. Therefore, the court can award only $4,962.50, plus interest, to Mr. de la Flor. Calculating interest at 6% per annum, beginning on the last billing date, April 11, 1989, and continuing to January 12, 1994, the court awards Mr. de la Flor daily interest of $.83 ($4,962.50 times .06 divided by 360

days per year), or a total interest payment of $1,441.71.

C. Disbursement Schedule

Therefore, upon consideration of the law, the moving papers, and oral argument thereon, the court orders the Clerk of the Court to remit a check in the amount of $6,404.21 to:

George de la Flor, Esq.
835 Fifth Avenue, Suite 309
San Diego, California 92101

Taxpayer Identification No. 567-33-1846

After remitting said check, the Clerk of the Court is ordered to remit a check for all the retained registry funds remaining for case no. 85-1719-B (AJB) to:

The Fischbach Companies
7 Hanover Square
New York, New York 10004

Taxpayer Identification No. 13-0710600

The Clerk of the Court shall remit said checks on February 17, 1994, or as soon as possible thereafter. This thirty five day window shall provide all parties time to receive this order and to file an appeal before these funds are released.

This order shall have no other effect on the court's December 15, 1993, disbursement order.

IT IS SO ORDERED.

FILED: JAN 13 1994

RUDI M. BREWSTER
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 85-1719-B (AJB)

ORDER DENYING PLAINTIFF'S REQUEST FOR FINDINGS OF FACT

The court has received plaintiff's "Request for Findings of Fact on the Court's Awards of Transcript Costs to Defendant Local 569 and of Attorney Fees on an (Ostensible) Lien by George de la Flor." The court declines to issue findings of fact. Plaintiff's request is DENIED.

IT IS SO ORDERED.

FILED: MAR 28 1994

RUDI M. BREWSTER
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 85-1719-B (AJB)

ORDER ESTABLISHING PROCEDURES FOR FILING MOTIONS

The court has received a letter from plaintiff, dated April 13, 1994, a copy of which is attached, seeking a hearing date for motions for reconsideration of several orders of the court. Due to the volume of paperwork this case has generated, and the number of motions that have been filed and likely will be filed, the court hereby establishes a new procedure for filing motions in this case, effective April 14, 1994.

Any party who wishes to have a motion heard shall not request a hearing date from chambers, but shall file the motion with the Clerk's Office. The Receiving Clerk is ordered to file-stamp such motions without a hearing date designated. Upon receiving a copy of said motion, the court will review it and decide whether it will entertain the motion. The court will issue its decision in a written order, which will be mailed to the parties. The court's order will; (1) state that the court declines to entertain the motion; or (2) state that the court will entertain the motion on the papers and set a briefing schedule; or (3) state that the court will entertain the motion at a hearing, set a hearing date and set a briefing schedule.

As for plaintiff's present request, he may file his motions with the Clerk's Office, and the court will respond according to the procedures outlined in this order.

IT IS SO ORDERED.

FILED: APR 18 1994

RUDI M. BREWSTER
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 94-0002-R

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS SAYLER AND HILLYER & IRWIN AND DISMISSING MOTION TO DISMISS

This matter comes before the Court on a motion for summary judgment[1] pursuant to rule 56(c) of the Federal Rules of Civil Procedure, filed by defendants STEVEN SAYLER and HILLYER & IRWIN, INC. ("Sayler and Hillyer") on April 19, 1994.[2]

This case stems from two previous cases brought by Plaintiff Lawrence Moore against the International Brotherhood of Electrical Workers Local 569 ("Local 569") and other defendants, which were tried by Judge Rudi M. Brewster. (District court case numbers 87-0172-B and 85-1719-B). In short, Moore alleges that Defendants Sayler and Hillyer are subject to liability for attaching proceeds from Moore's verdict in case 85-1719, in an attempt to collect monies owed to their client by Moore pursuant to a judgment in case 87-0172.

For the reasons set forth below, the Court finds that Moore

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[1] Defendants Sayler and Hillyer filed a motion to dismiss on March 31, 1994. Co-defendants Levy and Levy, Goldman & Levy, filed a motion for summary judgment which was set for the same motion date. Sayler and Hillyer joined in the motion for summary judgment. Having considered the arguments, the Court is granting the motion for summary judgment and dismissing the motion to dismiss as moot.

[2] Pursuant to Southern District of California Local Rule 7.1(d)(1), this Court finds this motion suitable for decision without oral argument.

has presented no triable issue of fact in his claim against defendants Sayler and Hillyer, and therefore the motion for summary judgment by defendants Sayler and Hillyer is granted.

BACKGROUND

This case is the seventh in a long line of actions filed in the Southern District of California by plaintiff Moore. Indeed, the Ninth Circuit noted recently that "Moore is no stranger to this court." *Moore v. Local Union 569 of the IBEW*, 989 F.2d 1534, 1537 (9th Cir. 1993). The instant action alleges that United States District Judge Rudi M. Brewster, his law clerk, Kathy Lowe, the former clerk of the Southern District, Don Hendrix, and the attorneys who represent entities formerly sued by plaintiff Moore, have conspired against Moore to deprive him of his constitutional rights, and intentionally inflicted emotional distress.

Specifically, Moore alleges that he was wrongfully deprived of a sum of money which he was awarded in a jury verdict in case no. 85-1719-B. Moore alleges that this deprivation constitutes a violation of his constitutional rights, civil conspiracy, fraud, and the intentional infliction of emotional distress.

Moore is a union electrician. In case number 85-1719-B, Moore sued Local 569, and a number of other defendants for violations of his rights under the Labor Management Relations Act ("LMRA"), the Labor Management Reporting and Disclosure Act ("LMRDA") and California state law. This case proceeded to a jury trial before Judge Brewster in 1989. The jury awarded Moore approximately $67,000.00 in economic and punitive damages against Local 569 and two individuals. The losing defendants filed appeals from the final order of the district court, and posted a bond for $70,000 to stay the execution of Moore's judgment. All three appeals were consolidated. The lower court judgment was affirmed by the Ninth Circuit on April 1, 1993. *See Moore v. IBEW Local 569, et al.*, 989 F.2d 1534(9th Cir. 1993).

While the first case was pending, Moore filed a subsequent suit in 1987 against Local 569, Fischbach & Moore, Inc.

("Fischbach"), an electrical contractor, and various other defendants. Fischbach's inclusion in the suit stemmed from the fact that Moore worked for Fischbach on a project for approximately five days. The law firm Hillyer & Irwin represented Fischbach & Moore, Inc., and Steven C. Sayler, an associate attorney employed by Hillyer, was the primary attorney assigned to work on the case.

A jury verdict in case no. 87-0172 exonerated Fischbach from Moore's claims of wrongdoing, and judgment was entered in favor of Fischbach on August 28, 1991. Fischbach, as the prevailing party, was entitled to recover its attorney fees and costs pursuant to a pre-trial agreement between the parties. *See* Inside Agreement, section 1.06.

On July 1, 1992, the District Court confirmed Fischbach's right to reasonable attorney's fees. An independent arbitration committee determined that attorney fees and costs in the amount of $224,140.01 were reasonable. On June 9, 1993, the District Court confirmed the award and entered judgment for Fischbach. Following Judge Brewster's denial of Moore's motion to amend the attorney fees award, Moore filed an appeal which is now pending at the Ninth Circuit (Appellate Docket Number 93-56717). Moore informed the parties that he had no assets or other means of satisfying the judgment.

Moore did, however, prevail against Local 569 and a number of Fischbach's co-defendants in case 87-0172, and was awarded $111,900 in damages and $17,044 in attorney fees. The losing defendants appealed the judgment, and the case is now on appeal at the Ninth Circuit. (Ninth Circuit Court of Appeal, case nos. 90-55557. 90-55558, 90-55559).

In 1991, Moore filed a third suit in federal court, naming Fischbach, Local 569, and numerous defendants. (Case No. 91-1543). Fischbach prevailed on a motion to dismiss, and was granted $2,201 in costs.

Following the Ninth Circuit's approval of Moore's initial jury verdict for $67,000 in case no. 85-1719, Moore filed an application with the District Court requesting release of the $70,000 bond which had been deposited with the Clerk of the Court pending that case's appeal. Fischbach filed an Application for Writ of Attachment and Notice of Lien in an

attempt to collect the money before it was released to Moore. At that point, however, Judge Brewster had not yet received a mandate notice from the Ninth Circuit and therefore denied both motions for lack of jurisdiction.

The parties proceeded to file various motions and requests in attempts to guarantee favorable treatment of the supersedeas bond. At a hearing on November 1, 1993, Judge Brewster indicated in open court that he intended to release the bond to Moore. The following day, Judge Brewster issued an order setting a show cause hearing to determine the validity of the various claims made by creditors against Moore's bond. The hearing was held December 1, 1993.

Judge Brewster found that creditors had claims against Moore which exceeded the amount of the supersedeas bond, and elected to apportion the bond amongst Moore's creditors. Judge Brewster found that Fischbach was entitled to receive an amount in excess of $45,000 based on the award of attorney fees it received in case no. 87-0172, and based upon its writ of execution. Moore appealed the order, and the issue is now pending before the Ninth Circuit. (Appellate Case no. 94-55120).

Moore then filed the instant action against Judge Brewster, his law clerk, the Clerk of the District Court, and the two law firms involved in collecting judgments against Moore by attaching the bond.

DISCUSSION

I. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." One of the principal purposes of the rule is to dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). As noted by the Supreme Court, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of

the Federal rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.*, 477 U.S. at 327 (quoting Fed.R.Civ.P. 1).

In considering a motion for summary judgment, the Court must examine all the evidence in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). A moving party who bears the burden of proof at trial is entitled to summary judgment only when the evidence indicates that no genuine issue of material fact exists. Fed.R.Civ.P. 56(c), *Celotex*, 477 U.S. 317, 324 (1986). If the moving party does not bear the burden of proof at trial, he may discharge his burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the non-moving party's case." *Id.* at 325. The moving party is not required to produce evidence showing the absence of genuine issue of material fact on such issues, nor must the moving party support its motion with evidence negating the nonmoving party's claim. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 885 (1990); Instead, "the motion may, and should, be granted so long as whatever is before the District Court demonstrates that the standard for the entry of judgment, as set forth in Rule 56(c), is satisfied." *Lujan*, 497 U.S. at 885 (quoting *Celotex*, 477 U.S. at 323).

II. Moore's Claims are Barred by the Doctrine of Issue Preclusion

Plaintiff Moore has raised a number of grievances. Primarily, he disputes Judge Brewster's approval of the attorney fees award from case 87-0172, and with Judge Brewster's approval of the set-off of this debt against Moore's jury verdict in case 85-1719. These issues, however, are issues which were raised and ruled upon by Judge Brewster. In addition, these issues were raised by Moore in his multiple petitions for writ of mandamus (Case No. 93-70839, denied December 10, 1993), and in his pending appeal (Appellate Case No. 94-55120).

The doctrine of issue preclusion (commonly referred to as collateral estoppel) prohibits the re-litigation of all issues of

fact or law that were actually litigated and necessarily decided in prior proceedings. 28 U.S.C.A. section 1728; *Robi v. Five Platter Inc.*, 838 F.2d 318, 322 (9th Cir. 1988). For collateral estoppel purposes, a federal court judgment is considered "final" as soon as it is rendered by the trial court. It makes no difference that an appeal from the judgment is pending. *Prager v. El Paso Nat'l Bank*, 417 F.2d 1111,1112 (1980).

Although the doctrine normally calls for identity of parties, substantial identity is all that is required. 7 Witkin section 283; *French v. Richell*, (1953) 40 C.2d 477, 481. While Moore's original complaint was against Sayler and Hillyer's client, rather than the firm itself, this formal difference in capacity is immaterial, as the same rights are being litigated. 7 Witkin section 285; *Bernhard v. Bank of America*, (1942) 19 C.2d 807.

Issue preclusion bars re-litigating any issue that was previously litigated in prior proceedings, even if the second proceeding is an action on a claim different from that asserted in the first proceeding. *Greater Los Angeles Counsel on Deafness v. Baldridge*, 827 F.2d 1353 (9th Cir. 1987). Although Moore's first action did not allege civil rights violations, the crux of his present action is that the $70,000 bond was wrongfully released to other parties, through the allegedly fraudulent and tortious actions of the lawyers, the judge, the clerk of the court, and the law clerk. If the bond was properly released to Moore's creditors, then the allegations in the present complaint cannot prevail, because they involve no wrongful act. As such, the instant matter involves the very same questions which were at issue in the previous litigation.

All disputes Moore has with Judge Brewster's ruling cannot be raised through a subsequent suit. Rather, they must be, and have been, raised on appeal.

III. Constitutional Violations

Moore alleges that Sayler and Hillyer, by attaching the bond posted in case 85-1719, and filing various liens against Moore, violated his Fifth Amendment protection from deprivation of property without due process of law. Moore

alleges both direct violations by defendants Brewster and Lowe, and secondary violations through civil conspiracy and fraud by the other defendants, including Sayler and Hillyer.

A.Civil Conspiracy

In his second cause of action, Moore alleges that Sayler and Hillyer conspired with the remaining defendants to violate Moore's rights under the Fifth Amendment. Moore alleges that defendants acted by "misrepresentations and omissions" and acted in an "unlawful manner" in furtherance of a "common scheme." In order to state a claim for civil conspiracy, a plaintiff must allege: (1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damages resulting from such acts. *Shick v. Lerner*, (1987) 193 Cal.App. 3d 1321, 1327-28.

The Court notes that a conspiracy must have as its object a "wrongful" act. Moore alleges that the object of the conspiracy was the deprivation of the $70,000 bond. No other property is involved. No other "wrongful act" has been alleged by Moore.

As discussed above, the Ninth Circuit is currently considering whether Judge Brewster's decision to allow Moore's creditors to attach the bond was within the Judge's discretion. (Appellate Case no. 94-55120). Any dispute surrounding that litigation is therefore confined to the jurisdiction of the Ninth Circuit, and cannot form the basis of a separate action.

Even assuming Moore had alleged wrongful acts under his civil conspiracy charge, Sayler and Hillyer are not subject to suit under this theory because Sayler and Hillyer were acting only as legal advisors to Fischbach, and they did not owe a duty to Moore to protect his interests. *Shick v. Lerner*, (1987) 193 Cal.App.3d 1321, 1330.

Moore therefore cannot state a claim against Sayler or Hillyer for civil conspiracy, and defendants are entitled to judgment as a matter of law.

B. Fraud

Moore alleges in his second cause of action that defendants

have "violat[ed] the Fifth Amendment to the United States Constitution by Fraud." Comp. at 20 (parentheses omitted). Pleadings alleging fraud must state the specific content of false representations as well as the identities of such misrepresentations. *Grau Mill Development Corp. v. Colonial Bank & Trust Co. of Chicago*, 927 F.2d 514 (1991); *see also* Fed.R.Civ.P. 9(b).

Moore states only that defendants "misled" plaintiff and "misrepresented themselves as officers of the court." Comp. at 20-21. The Court notes, however, that defendants were, in fact, officers of the court. Furthermore, Plaintiff fails to allege specifically the manner in which defendants "misled" him.

Moore has failed to produce any facts supporting his allegations. He has plead only general allegations of fraud, without indicating which statements in particular were misleading or even which specific party was responsible. Conclusory allegations of fraud are not sufficient to state a claim under Fed.R.Civ.P. 9(b). *Keith v. Stoeltinig, Inc.*, 915 F.2d 996 (5th Cir. 1990).

Sayler and Hillyer have met the requirement of Rule 56 by showing that there is an absence of evidence to support the non-moving party's case. The burden then shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). It is not enough for the party opposing a properly supported motion for summary judgment to "rest on mere allegations or denials of his pleadings." *Id.* Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250.

To make such a showing, Moore must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial under *Celotex*. Moore has failed to make a sufficient showing of an element of its case with respect to which he has the burden of proof. Sayler and Hillyer are thus entitled to judgment as a matter of law.

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IV. Intentional Infliction of Emotional Distress

Moore has also accused defendants of intentionally inflicting emotional distress, a tort. Section 47(2) of the California Civil Code shields parties from liability for tort, except the tort of malicious prosecution, when made in the course of a "judicial proceeding." *Kimmel v. Goland*, (1990) 51 Cal.3d 202, 209. In *Kimmel*, the California Supreme court held that Section 47 extends to any communication:

> (1) made in judicial or quasi-judicial proceedings;
> (2) by litigants or other participants authorized by law;
> (3) to achieve the objects of the litigation; and
> (4) that [has] some connection or logical relation to the action.

Kimmel, 51 Cal.3d at 209. In the instant matter, all of the actions and communications of Sayler and Hillyer were made in judicial proceedings to achieve the objects of the underlying litigation. Therefore Sayler and Hillyer are immune from suit for intentional infliction of emotional distress.

V. Conclusion

For the reasons stated above, the Court finds that Plaintiff has not and cannot state a claim against Defendants Sayler an Hillyer. The Motion for Summary Judgment is therefore GRANTED. The motion to dismiss is moot, and is therefore dismissed.

IT IS SO ORDERED.

FILED: JUN 2 1994

JOHN S. RHOADES, SR.
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 94-0002-R

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS LEVY AND LEVY, GOLDMAN & LEVY

This matter comes before the Court on a motion for summary judgment pursuant to rule 56(c) of the Federal Rules of Civil Procedure, filed by defendants LEWIS N. LEVY and LEVY, GOLDMAN AND LEVY ("Levy and LGL") on April 15, 1994.[1]

The action against Levy and LGL stems from a previous case brought by Plaintiff LAWRENCE MOORE against the International Brotherhood of Electrical Workers Local 569 ("Local 569") and other defendants, which was tried by Judge Rudi M. Brewster (District court case number 85-1719-B). Moore alleges that Levy and LGL, who represented Local 569, deprived Moore of his constitutional rights by attaching proceeds from Moore's jury verdict in that case.

For the reasons set forth below, the Court finds that Moore has presented no triable issue of fact in his claim against defendants Levy and LGL, and therefore the motion for summary judgment by defendants Levy and LGL is granted.

BACKGROUND

A detailed history of Plaintiff Moore's numerous actions in Federal Court is set forth in a companion order.[2] The instant

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[1] Pursuant to Southern District of California Local Rule 7.1(d)(1), this Court finds this motion suitable for decision without oral argument.

[2] *See* Order Granting Motion by Defendants Sayler and Hillyer & Irwin for summary judgment (filed June 2, 1994).

action alleges that United States District Judge Rudi M. Brewster, his law clerk, Kathy Lowe, the former clerk of the Southern District, Don Hendrix, and the attorneys who represent entities formerly sued by plaintiff Moore, have conspired against Moore to deprive him of his constitutional rights, and intentionally inflicted emotional distress.

Specifically, Moore alleges that he was wrongfully deprived of a sum of money which he was awarded in a jury verdict in Case No. 85-1719-B. Moore alleges that this deprivation constitutes a violation of his constitutional right, civil conspiracy, fraud, and the intentional infliction of emotional distress.

Moore is a union electrician. In case number 85-1719-B, Moore sued Local 569, and a number of other defendants for violations of his rights under the Labor Management Relations Act ("LMRA"), the Labor Management Reporting and Disclosure Act ("LMRDA") and California state law. This case proceeded to a jury trial before Judge Brewster in 1989. The jury awarded Moore approximately $67,000.00 in economic and punitive damages against Local 569 and two individuals. The losing defendants filed appeals from the final order of the district court, and posted a bond for $70,000 to stay the execution of Moore's judgment. All three appeals were consolidated. The district court required Local 569 to order and pay for the transcripts of the trial for purposes of the appeal. The lower court judgment was affirmed by the Ninth Circuit on April 1, 1993. *See Moore v. IBEW Local 569, et al.*, 989 F.2d 1534 (9th Cir. 1993).

Pursuant to Federal Rule of Appellate Procedure 39, counsel for Local 539 and Defendants in this action, Lewis Levy and goldman, Lewis and Levy, filed a Bill of Costs with the clerk of the Court for the Southern District. Specifically, they sought apportionment of the cost of preparing the transcripts of the trial for the appeal. Local 569 requested that Moore be required to pay $14,148.00, an apportioned amount of the total cost of preparing the transcripts. On April 29, 1993, defendant Lewis Levy appeared before Don Hendrix, former clerk of the Southern District for the purpose of taxing the costs. Moore did not appear for the hearing. Clerk

Hendrix awarded Local 569 $14,148.00 in appellate costs.

After the appeal was affirmed, Moore petitioned Judge Brewster for release of the bond. On December 1, 1993, Judge Brewster held a hearing to determine the appropriate disbursement of the bond. Moore objected to releasing portions of the bond to pay claims against him. In addition, Moore objected to the decision by Hendrix to tax him approximately $14,000 for the transcripts. After hearing argument from various parties with claims to Moore's bond, Judge Brewster divided the bond amongst the creditor. Judge Brewster allotted $14,148.00 to Local 569 in collection of the bill of costs award granted by Clerk Hendrix.

Moore next filed a writ of mandate with the Ninth Circuit, asking the Ninth Circuit to overturn Judge Brewster's order apportioning his bond. The appeal was dismissed by the Ninth Circuit on December 10, 1993.

On January 13, 1994, Moore filed an appeal from Judge Brewster's order in Case No. 85-1719. That appeal is pending, and is docketed as Ninth Circuit Appeal No. 94-55120.

DISCUSSION

I. Summary Judgment Motion

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." One of the principal purposes of the rule is to dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). As noted by the Supreme Court, "[s]ummary judgment procedure is properly regarded not a disfavored procedural shortcut, but rather as an integral part of the Federal rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action." *Celotex Corp.*, 477 U.S. at 327 (quoting Fed.R.Civ.P. 1).

In considering a motion for summary judgment, the Court must examine all the evidence in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369

U.S. 654, 655 (1962). A moving party who bears the burden of proof at trial is entitled to summary judgment only when the evidence indicates that no genuine issue of material fact exists. Fed.R.Civ.P. 56(c), *Celotex*, 477 U.S. 317, 324 (1986). If the moving party does not bear the burden of proof at trial, he may discharge his burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the non-moving party's case." *Id.* at p. 325. The moving party is not required to produce evidence showing the absence of genuine issue of material fact on such issues, nor must the moving party support its motion with evidence negating the nonmoving party's claim. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 885 (1990); Instead, "the motion may, and should, be granted so long as whatever is before the District Court demonstrates that the standard for the entry of judgment, as set forth in Rule 56(c), is satisfied." *Lujan*, 497 U.S. at 885 (quoting *Celotex*, 477 U.S. at 323).

Once the moving party meets the requirement of Rule 56 by either showing that no genuine issue of material fact remains or that there is an absence of evidence to support the non-moving party's case, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). It is not enough for the party opposing a properly supported motion for summary judgment to "rest on mere allegations or denials of his pleadings." *Id.* Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250.

To make such a showing, the nonmoving party must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. *Celotex* at 325. Such evidence need not be in a form admissible at trial to avoid summary judgment. *Id.* The moving party is entitled to judgment as a matter of law if the nonmovant fails to make a sufficient showing of an element of its case with respect to which it has the burden of proof. *Id.*

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II. Moore's Claims are Barred by the Doctrine of Issue Preclusion

> As stated by Plaintiff Moore in his Opposition papers, the gravamen of the Complaint in this action is Defendants' interference with jury verdicts for Plaintiff, as represented by a bond posted by losing IBEW Local 569 Defendants in Case No. 85-1719-B, to stay execution of judgment.

Opp. to Mot. at 2. Moore goes on to state that Judge Brewster "abused his role as a District Court judge to act as an advocate for corrupt defense contractor . . ." *Id.* Moore is entitled to object to Judge Brewster's ruling, and to argue that Judge Brewster abused his discretion in granting Local 569's motion to offset the costs of appeal. However, under the doctrine of issue preclusion, Moore is limited to bringing this argument on direct appeal to the Ninth Circuit.

The doctrine of issue preclusion (also commonly referred to as collateral estoppel) prohibits the re-litigation of all issues of fact or law that were actually litigated and necessarily decided in prior proceedings. 28 U.S.C.A. Section 1728; *Robi v. Five Platter Inc.*, 838 F.2d 318, 322 (9th Cir. 1988). For collateral estoppel purposes, a federal court judgment is considered "final" as soon as it is rendered by the trial court. It makes no difference that an appeal from the judgment is pending. *Prager v. El Paso Nat'l Bank*, 417 F.2d 1111, 1112 (1980).

Whereas the doctrine normally calls for identity of parties, substantial identity is all that is required. 7 Witkin Section 283; *French v. Richell*, (1953) 40 C.2d 477, 481. Although Moore's original complaint was against Levy and LGL's client, rather than the firm itself, this formal difference in capacity is immaterial, as the same rights are being litigated. 7 Witkin Section 285; *Bernhard v. Bank of America*, (1942) 19 C.2d 807.

Issue preclusion bars re-litigating any issue that was previously litigated in prior proceedings, even if the second proceeding is an action on a claim different from that asserted in the first proceeding. *Greater Los Angeles Counsel on Deafness v. Baldridge*, 827 F.2d 1353 (9th Cir. 1987). Although Moore's first action did not allege civil rights

violations, the crux of his present action is that the $70,000 bond was wrongfully released to other parties, through the allegedly fraudulent and tortious actions of the lawyers, the judge, the clerk of the court, and the law clerk. If the bond was properly released to Moore's creditors, then the allegations in the present complaint cannot prevail, because they involve no wrongful act. As such, the instant matter involves the very same questions which were at issue in the previous litigation.

Any dispute Moore has with Judge Brewster's ruling cannot be raised through a subsequent suit. Rather, it must be, and has been, raised on appeal. (see footnote 3: Moore also raised these issues in his initial and two supplemental petitions for a writ of mandamus filed October 4, 1993, November 5, 1993, and November 8, 1993.) *See* Appellate Case No. 94-55120.

III. Constitutional Violations

Moore alleges that Levy and LGL, by attaching the bond posted in case 85-1719, violated his Fifth Amendment protection from deprivation of property without due process of law. Moore alleges both direct violations by defendants Brewster and Lowe, and secondary violations through civil conspiracy and fraud by the other defendants, including Levy and LGL.

A. Civil Conspiracy

In his second cause of action, Moore alleges that Levy and LGL conspired with the remaining defendants to violate Moore's rights under the Fifth Amendment. Moore alleges that defendants acted by "misrepresentations and omissions" and acted in an "unlawful manner" in furtherance of a "common scheme." In order to state a claim for civil conspiracy, a plaintiff must allege: (1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damages resulting from such acts. *Shick v. Lerner*, (1987) 193 Cal. app. 3d 1321, 1327-28.

The Court notes that a conspiracy must have as its object a "wrongful" act. Moore alleges that the object of the conspiracy was the deprivation of the $70,000 bond. No other property is involved. No other "wrongful act" has been alleged by Moore.

The Ninth Circuit is currently considering whether Judge Brewster's decision to allow Moore's creditors to attach the bond was within the Judge's discretion. Any dispute surrounding that litigation is therefore confined to the jurisdiction of the Ninth Circuit, and cannot form the basis of a separate action. *See* Appellate Case No. 94-55120.

Even assuming Moore had alleged wrongful acts under his civil conspiracy charge, Levy and LGL are not subject to suit under this theory because Levy and LGL were acting only as legal advisors to Fischbach, and they did not owe a duty to Moore to protect his interests. *Shick v. Lerner*, (1987) 193 Cal.App.3d 1321, 1330.

Moore therefore cannot state a claim against Levy or LGL for civil conspiracy, and the claim must be dismissed.

B. Fraud

Moore alleges in his second cause of action that defendants have "violat[ed] the Fifth Amendment to the United States Constitution by Fraud." Comp. at 20 (parentheses omitted). Pleadings alleging fraud must state the specific content of false representations as well as the identities of such misrepresentations. *Grau Mill Development Corp. v. Colonial Bank & Trust Co. of Chicago*, 927 F.2d 514 (1991); *see also* Fed.R.Civ.P. 9(b).

Moore states only that defendants "misled" plaintiff and "misrepresented themselves as officers of the court." Comp. at 20-21. The Court notes, however, that defendants were, in fact, officers of the court. Furthermore, Plaintiff fails to allege specifically the manner in which defendants misled him.

Moore has failed to produce any facts supporting his allegations. He has pled only general allegations of fraud, without indicating which statements in particular were misleading or even which specific party was responsible. Conclusory allegations of fraud are not sufficient to state a claim under Fed.R.Civ.P. 9(b). *Keith v. Stoeltinig, Inc.*, 915 F.2d 996 (5th Cir. 1990).

Levy and LGL have met the requirement of Rule 56 by showing that there is an absence of evidence to support the non-moving party's case. The burden then shifts to the party resisting the motion, who "must set forth specific facts

showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). It is not enough for the party opposing a properly supported motion for summary judgment to "rest on mere allegations or denials of his pleadings." *Id.* Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250.

To make such a showing, Moore must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial under *Celotex*. Moore has failed to make a sufficient showing of an element with which he has the burden of proof. Levy and LGL are thus entitled to judgment as a matter of law.

IV. Intentional Infliction of Emotional Distress

Moore also claims damages from Defendants for intentional infliction of emotional distress. Under section 47(2) of the California Civil Code shields parties from liability for tort, except tort of malicious prosecution, when made in the course of a "judicial proceeding." *Kimmel v. Goland*, (1990) 51 Cal.3d 202, 209. In *Kimmel*, the California Supreme Court held that Section 47 extends to any communication:

(1) made in judicial or quasi-judicial proceedings;
(2) by litigants or other participants authorized by law;
(3) to achieve the objects of the litigation; and
(4) that [has] some connection or logical relation to the action.

Kimmel, 51 Cal.3d at 209. In the instant matter, all of the actions and communications of Levy and LGL were made in judicial proceedings to achieve the objects of the underlying litigation. Therefore Levy and LGL are immune from suit for intentional infliction of emotional distress.

V. Conclusion

For the reasons stated above, the Court finds that Plaintiff has failed to present any triable issue of fact, and Defendants Levy and LGL are entitled to judgment as a matter of law. The Motion for Summary Judgment is therefore GRANTED.

IT IS SO ORDERED.

FILED: JUN 2 1994

JOHN S. RHOADES, SR.
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 94-0002-R

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS RUDI M. BREWSTER, KATHY LOWE, AND DON HENDRIX

This matter comes before the Court on a motion to dismiss filed by defendants RUDI M. BREWSTER, KATHY LOWE, AND DON HENDRIX ("Defendants") on April 11, 1994.[1] The action against Defendants stems from a series of cases brought by Plaintiff LAWRENCE MOORE against the International Brotherhood of Electrical Workers Local 569 ("Local 569") and other defendants, which were before Judge Rudi M. Brewster. (District court case numbers 85-1719-B, 87-0172-B and 91-1543-B).

For the reasons set forth below, the court finds that Defendants are entitled to absolute immunity from the claims presented by Moore, and therefore the complaint is dismissed with prejudice.

BACKGROUND

A detailed history of Plaintiff Moore's numerous actions in Federal Court is set forth in two previous motions for summary judgment in this matter. (see footnote 2) The instant action alleges that United States District Judge Rudi M. Brewster, his law clerk, Kathy Lowe, the former Clerk of the Southern District, Don Hendrix, and the attorneys who represent entities formerly sued by plaintiff Moore, have conspired against Moore to deprive him of his constitutional

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[1] Pursuant to Southern District of California Local Rule 7.1(d)(1), this Court finds this motion suitable for decision without oral argument.

rights, and intentionally inflicted emotional distress.

Specifically, Moore alleges that Judge Brewster, Lowe, and Hendrix, through their individual and collective actions, wrongfully deprived him of a sum of money which he was awarded in a jury verdict in Case No. 85-1719-B. Moore alleges that this deprivation constitutes a violation of his constitutional rights, civil conspiracy, fraud, and the intentional infliction of emotional distress.

Moore is a union electrician. In case number 85-1719-B, Moore sued Local 569, and a number of other defendants for violations of his rights under the Labor Management Relations Act ("LMRA"), the Labor Management Reporting and Disclosure Act 9"LMRDA") and California state law. This case proceeded to a jury trial before Judge Brewster in 1989. The jury awarded Moore approximately $67,000.00 in economic and punitive damages against Local 569 and two individuals. The losing defendants filed appeals from the final order of the district court, and posted a bond for $70,000 to stay the execution of Moore's judgment. All appeals were consolidated. The district court required Local 569 to order and pay for the transcripts of the trial for purposes of appeal.

Pursuant to Federal Rule of Appellate Procedure 39, counsel for Local 569 and Defendants in this action, Lewis Levy and Goldman, Lewis and Levy, filed a Bill of Costs with the clerk of the Court for the Southern District. Specifically, they sought apportionment of the cost of preparing the transcripts of the trial for the appeal. Local 569 requested that Moore be required to pay $14,148.00, an apportioned amount of the total cost of preparing the transcripts. On April 29, 1993, defendant Lewis Levy appeared before Don Hendrix, former clerk of the Southern District for the purpose of taxing the costs. Moore did not appear for the hearing. Clerk Hendrix awarded Local 569 $14,148.00 in appellate costs.

In a subsequent case by Moore against the Local 569 and other defendants (case number 87-0172), defendant Fischbach & Moore, Inc. was awarded $224,140.01 against plaintiff Moore for attorneys fees and costs in defending the suit. Judge Brewster awarded the fees after finding that they were reasonable, and that Moore was bound by the terms of a pre-

trial agreement between the parties.

The lower court judgment in case 85-1719 was affirmed by the Ninth Circuit on April 1, 1993. See Moore v. IBEW Local 569, et al., 989 F.2d 1534 (9th Cir. 1993). After the appeal was affirmed in case 85-1719, Moore petitioned Judge Brewster for release of the $70,000 bond. Moore's creditors, including Fischbach and Local 569 objected, and asked the court to apportion the bond. On December 1, 1993, Judge Brewster held a hearing to determine the appropriate disbursement of the bond. Moore objected to releasing portions of the bond to pay claims against him lodged by Levy, Fischbach, and Moore's other creditors. In addition, Moore objected to the decision by Hendrix to tax him approximately $14,000 for the appellate transcripts.

After hearing argument from various parties with claims to Moore's bond, Judge Brewster divided the bond amongst the creditors. Judge Brewster allotted $14,148.00 to Local 569 in collection of the bill of costs award granted by Clerk Hendrix, and over $45,000 to Fischbach in payment of the award of attorneys fees.

Moore next filed a petition for writ of mandamus with the Ninth Circuit, asking the Ninth Circuit to overturn Judge Brewster's order apportioning the bond. The petition was dismissed by the Ninth Circuit on December 10, 1993.

On January 13, 1994, Moore filed an appeal from Judge Brewster's order in Case No. 85-1719. That appeal is pending, and is docketed as Ninth Circuit Appeal No. 94-55120.

III. DISCUSSION

A. MOTION TO DISMISS

On a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), the complaint is construed in the light most favorable to the plaintiff, and its allegations are taken as true. Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969); McKinney v. DeBord, 507 F.2d 501, 503 (9th Cir. 1974). A motion to dismiss is generally viewed with disfavor, and only rarely granted. United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). In

reviewing a complaint, a court should let the claims stand "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gobson, 355, U.S. 41, 45 (1957). A pro se litigant should be given leave to amend a complaint unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment. Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987).

B. JUDGE BREWSTER IS ENTITLED TO ABSOLUTE JUDICIAL IMMUNITY

Judges are absolutely immune from damages actions for judicial acts taken within the jurisdiction of their courts. Ashelman v. Pope, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc). Furthermore, "judicial immunity is not overcome by allegations of bad faith or malice .. . ." Mireles v. Waco, 112, S.Ct. 286, 288 (1991). The Ninth Circuit has construed the scope of this immunity broadly. "As long as the judge's ultimate acts are judicial actions taken within the court's subject matter jurisdiction, immunity applies." Ashelman, 793 F.2d at 1078.

A judge will lose his immunity only in two circumstances. First, a judge loses immunity when the judge acts in the clear absence of all jurisdiction. Schucker v. Rockwood, 846 F.2d 1202, 1204 (9th Cir.). cert. denied, 488 U.S. 995 (1988). Second, a judge is not immune for actions not taken in a judicial capacity. Mireles, 112 S.Ct. at 288. Thus, Judge Brewster is liable only if he acted in clear absence of all jurisdiction, or if his actions were of a nonjudicial nature.

Judicial actions taken after an appeal has been filed are not considered to be actions taken in the clear absence of all jurisdiction. schucker, 846 F.2d at 1204; Mullis v. United States Bankruptcy Court, 828 F.2d 1385, 1389 (9th Cir. 1987), cert. denied, 486 U.S. 1040 (1988). Therefore, Plaintiff's claim that Judge Brewster's actions taken after a notice of appeal had been filed were in excess of his jurisdiction is invalid.

In Schucker, a plaintiff brought a federal civil rights claim against a state judge based upon the judge having taken certain

actions after the plaintiff had filed a notice of appeal in the state appellate court. The district court dismissed the claim based upon the judge's immunity. On appeal, the Ninth Circuit affirmed, stating "[e]ven assuming [defendant's] assumption of jurisdiction was 'in excess of jurisdiction,' the act was not done 'in the clear absence of jurisdiction.' " Schucker, 846 F.2d at 1204. Thus Judge Brewster's actions were not taken "in the clear absence of jurisdiction" so as to deprive him of judicial immunity.

Plaintiff further alleges that Judge Brewster's actions were not judicial in nature. However, Plaintiff never specifically enumerates which actions he is referring to. Throughout the complaint, Plaintiff asserts that Judge Brewster was acting in his capacity as an "officer of the court." Compl. paragraph 134, 139, 143, 147. Furthermore, the challenged actions were all taken in the course of litigation. Therefore, these actions were well within the broad scope of the district court's subject matter jurisdiction, and must be considered judicial in nature. Furthermore, Plaintiff's allegations of judge Brewster's malicious intentions do not strip Judge Brewster of judicial immunity. Mireles, 112, S.Ct. at 288. Therefore, Judge Brewster is shielded from Plaintiff's action by judicial immunity.

C. DEFENDANTS HENDRIX AND LOWE ARE ENTITLED TO QUASI-JUDICIAL IMMUNITY

The Supreme Court and other courts have extended the doctrine of absolute immunity "to certain others who perform functions closely associated with the judicial process." Cleavinger v. Saxner, 474 U.S. 193, 200 (1985). Absolute immunity is derived from the nature of the responsibilities of an individual. Id. at 201. In Cleavinger, the Supreme Court enumerated certain factors useful in determining whether immunity should be granted:

> (a) the need to assure that the individual can perform his function without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct;

(c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

474 U.S. at 202 (citing Butz v. Economou, 438 U.S. 478 (1978). These factors support the extension of quasi-judicial immunity to defendants Hendrix and Lowe.

The Ninth Circuit has held that court clerks are entitled to absolute quasi-judicial immunity for actions taken which are an essential part of the judicial function, and are within the jurisdiction of the clerks. Mullis, 828 F.2d at 1390. See also, Sharma v. Stevas, 790 F.2d 1486 (9th Cir. 1986) (clerk of the United States Supreme Court has absolute quasi-judicial immunity for actions taken which were "an integral part of the judicial process").

In Mullis, the plaintiff alleged, inter alia, that the court clerks had given him erroneous filing information, and had accepted and filed incomplete petitions. The district court dismissed the plaintiff's action, in regard to the clerks, on the ground that the clerks were immune. On appeal, the Ninth Circuit affirmed, holding that the actions taken by the clerks were all essential to the judicial process, and were within the jurisdiction of the court clerks.

Thus, defendants Hendrix and Lower are entitled to absolute quasi-judicial immunity for actions taken which are "an integral part of the judicial process."

1. Defendant Hendrix

Even is the Court accepts as true the allegations made by Plaintiff regarding defendant Hendrix, those actions are all properly categorized as being within the scope of his position as Clerk of the District Court. Plaintiff alleges that defendant Hendrix improperly conducted hearings to assess costs, and communicated misinformation to the Plaintiff. These actions were taken pursuant to orders from Judge Brewster, pertain solely to the litigation, and are clearly within the jurisdiction of a Clerk of the District Court. Thus, because Defendant Hendrix's actions were a necessary part of the judicial process, he is entitled to absolute quasi-judicial immunity from suits based upon those action.

2. Defendant Lowe

The work of a law clerk is entirely judicial in nature. Law clerks perform tasks intimately connected with the judge's exercise of the judicial function. "Law clerks are simply

extensions of the judges at whose pleasure they serve." Oliva v. Heller, 839 F.2d 37, 40 (2d Cir. 1988) (quoting Oliva v Heller, 670 F.Supp 523, 526 (S.D.N.Y. 1987)). The fifth Circuit has held that "the judge's law clerk, when assisting the judge in carrying out the former's judicial function, is likewise entitled to absolute immunity." Mitchell v. McBryde, 944 F.2d 229, 230 (5th Cir. 1991). Therefore, "for purposes of absolute judicial immunity, judges and their law clerks are as one." Oliva, 839 F.2d at 40.

Defendant Lowe's actions concerned only Plaintiff's litigation. These actions were well within the scope of defendant Lowe's official duties, and were an integral part of the judicial process. Therefore, Defendant Lowe is entitled to absolute quasi-judicial immunity. Plaintiff's action may not be maintained.

IV CONCLUSION

Because Defendants in this action are shielded by absolute judicial or quasi-judicial immunity, Plaintiff has failed to state a claim upon which he is entitled to relief. Furthermore, due to this immunity, it is beyond a reasonable doubt that Plaintiff will be unable to amend his complaint to cure this defect. Accordingly, Plaintiff's action with regard to defendants is dismissed without leave to amend.

IT IS SO ORDERED.

FILED: JUL 25 1994

JOHN S. RHOADES, SR.
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NUMBER: 94-2-R

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED THAT MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS RUDI M. BREWSTER, KATHY LOWE AND DON HENDRIX IS GRANTED WITHOUT LEAVE TO AMEND. AS DEFENDANTS SAYLER AND HILLYER AND IRWIN INC WERE DISMISSED BY ORDER FILED JUNE 2, 1994 AND DEFENDANTS LEWIS LEVY AND GOLDMAN AND LEVY INC WERE DISMISSED BY ORDER OF JUNE 2, 1994, ALL DEFENDANTS HAVE BEEN DISMISSED AND CASE IS TERMINATED.....

FILED: JULY 27, 1994 ROBERTA WESTDAL
Clerk

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-56334
94-56429
D.C. CV-94-0002-JSR

OPINION

Appeals from the United States District Court
for the Southern District of California
John S. Rhoades, District Judge, Presiding

Submitted August 9, 1996
Pasadena, California

Filed September 23, 1996*

Before: Betty B. Fletcher and A. Wallace Tashima, Circuit Judges, and Jane A. Restani,** Judge, United States Court of International Trade.

Opinion by Judge Fletcher

SUMMARY

Civil Litigation & Procedure/Immunity

The court of appeals affirmed a judgment of the district court in part and vacated an order. The court held that a district court judge and a law clerk have absolute immunity from a litigant's suit alleging a conspiracy with an adverse party to award costs and satisfy a lien or judgment.

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* The panel unanimouslly finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a) Ninth Circuit Rule 34.4.
** Honorable Jane A. Restani, Judge of the United States court of International Trade, sitting by designation.

When appellant Lawrence Moore worked for Fischbach & Moore, Inc. he was represented by Local 569 of the International Brotherhood of Electrical Workers. Moore won a $66,000 judgment against Local 569 and the union posted a $70,000 supersedeas bond to stay its execution. During the trial, Local 569 was represented by appellee Lewis Levy, a member of appellee Levy, Goldman & Levy (LGL). In *Moore I*, the court of appeals affirmed and Moore moved for release of the bond.

Moore's judgment creditors filed claims against the bond. In a bond disposition hearing, appellee District Judge Rudi Brewster distributed over $45,000 to Fischbach to satisfy its fee awards and granted an offset of over $14,000 to Local 569 for reporter's transcript costs taxed to Moore. In these proceedings, Levy represented Local 569 and appellee Steven Sayler, an attorney with appellee Hillyer & Irwin (H&I), represented Fischbach.

Moore brought a separate unsuccessful action against Fischbach. Judge Brewster approved an award of $244,000 in attorneys' fees to Fischbach under the fee-shifting provisions of the Fischbach-Local 569 collective bargaining agreement (CBA). In *Moore II* the court of appeals reversed, holding that the fee-shifting provisions of the CBA violated the Labor-Management Reporting and Disclosure Act. Fischbach had been represented by Sayler in the action.

On Moore's appeal from the bond disposition orders, the court of appeals in *Moore III* affirmed in part and reversed in part. The court held that Judge Brewster had jurisdiction over the distribution of the bond proceeds and that the offset for Local 569 was proper, but that the distribution to Fischbach was improper in light of *Moore II*.

Moore filed an action against Judge Brewster, appellee Kathy Lowe (his law clerk), appellee Don Hendrix (clerk of the court), Levy, LG&L, Sayler, and H&I. He alleged causes of action for violations of his right to due process, civil

conspiracy, fraud and intentional infliction of emotional distress. As to Levy and LG&L, Moore alleged that while acting as counsel for Local 569, they wrongfully obtained the $14,000 offset against the $70,000 bond posted by the union. He also claimed that Sayler and the court improperly communicated about Fischbach's interest in the bond, that the defendants agreed illegally to deprive Moore of the bond's protections, and that the defendants fraudulently misled him.

The district court dismissed the claims against Judge Brewster, Lowe, and Hendrix on the ground of judicial immunity. The court granted summary judgment for Levy and LG&L on the ground of issue preclusion, and for Sayler and H&I on Moore's claims for civil conspiracy, fraud, and intentional infliction of emotional distress.

Moore appealed the dismissals and then moved to amend his complaint. The district court denied the motion and Moore appealed from the resulting order. He filed a motion in the court of appeals requesting that the court take judicial notice of two orders and a letter concerning distribution of related funds.

[1] Judge Brewster enjoyed absolute judicial immunity from Moore's action. A judge is generally immune from a civil action for damages, declaratory, injunctive, or other equitable relief. [2] Moore's allegations of legal error did not deprive Judge Brewster of judicial immunity, which applies however erroneous the act may have been and however injurious in its consequences it may have proved to the plaintiff. Nor is judicial immunity lost by allegations that a judge conspired with one party to rule against another party. Even if Judge Brewster conspired with Sayler to act as an advocate for Fischbach, and interfered with the release of the bond proceeds for the benefit of Fischbach, judicial immunity would have barred Moore's action against Judge Brewster.

[4] The doctrine of judicial immunity has two exceptions neither of which applied to Judge Brewster: a judge will be subject to liability for acting in the clear absence of all

jurisdiction, and only judicial acts are protected. Judge Brewster acted well within his jurisdiction by taxing costs and issuing orders regarding Moore's judgment creditors pursuant to Fischbach's writ of execution and the filing of valid liens.

[5] While acting as clerk of the district court, Hendrix in many of his actions performed quasi-judicial functions as to which he was entitled to absolute immunity. Even if Hendrix deceived Moore regarding the status of the bond and improperly conducted hearings to assess costs, all in coordination with Judge Brewster, such acts fell within Hendrix's quasi-judicial duties and were protected by absolute immunity.

[6] Lowe, while acting as law clerk for Judge Brewster, enjoyed absolute judicial immunity. Because a law clerk is probably the one participant in the judicial process whole duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function, Lowe was covered by the doctrine of absolute immunity.

[7] Issue preclusion barred Moore's action against Levy and LG&L. The doctrine prevents relitigation of all issues of fact or law that were actually litigated and necessarily decided in a prior proceeding. The priority of the $14,000 offset against the $70,000 bond had been litigated and decided when the court of appeal held that Judge Brewster did not abuse his discretion when he granted the offset.

[8] Moore failed to produce sufficient evidence to survive summary judgment in his civil conspiracy claim. The indispensable elements of civil conspiracy include a wrongful act and knowledge on the part of the alleged conspirators of the conspiracy's unlawful objective. Moore produced no evidence of either a wrongful act or wrongful intent.

[9] Moore failed to produce sufficient evidence to survive summary judgment on his fraud claim as well. The indispensable elements of a fraud claim include a false

representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages. Moore failed to allege or produce evidence of a single example of misrepresentation by Sayler. Nor did he allege scienter, intent to defraud, or reliance by Moore on anything Sayler did or said. [10] Moore also failed to plead fraud with adequate particularity. He failed to identify any statements or actions by Sayler or explain in what way such statements or actions were fraudulent.

[11] Moore's action for intentional infliction of emotional distress was barred by California Civil Code section 47(b)(2), which privileges communications made during judicial proceedings. All the alleged communications were made by litigants during the course of judicial proceedings, and all had a logical relation to the object of the litigation, i.e., the bond.

[12] By filing the notice of appeal, Moore divested the district court of jurisdiction over the matter. Accordingly, the district court on remand was to vacate the denial of Moore's motion to amend and to dismiss the motion for lack of jurisdiction.

COUNSEL

Lawrence Moore, San Diego, California, for the appellant in pro per.
Thomas C. Stahl, Assistant United States Attorney, San Diego, California; Melissa Cook, Strauss, Kissane & Cook, San Diego, California; Norman R. Allenby, Hillyer & Irwin, San Diego, California, for the defendants-appellees.

OPINION

FLETCHER, Circuit Judge:

Lawrence Moore appeals pro se the dismissal under Rule 12(b)(6) of his claims against United States District Judge Rudi M. Brewster, his law clerk Kathy Lowe, the clerk of court

Don Hendrix, and the dismissal on summary judgment of his claims against attorneys Lewis Levy and Steven Sayler and their respective law firms, Levy, Goldman & Levy, Inc. and Hillyer & Irwin, Inc. Moore alleged that the defendants illegally conspired to deprive him of the proceeds of a judgment in his favor in a separate action. WE have jurisdiction, 28 U.S.C. Sec. 1219, and we affirm.

I

Moore, an electrician, once worked for Fischbach & Moore, Inc. ("Fischbach"), a defense contractor, where he was represented by Local 569 of the International Brotherhood of Electrical Workers ("Local 569").

In 1985, Moore brought an action in federal court against Local 569. Judge Brewster presided over the trial, and the jury found for Moore, awarding him over $66,000 in damages. Local 569 appealed and posted a supersedeas bond of $70,000 to stay the execution of Moore's judgment. In 1993, the Ninth Circuit affirmed the judgment for Moore. *Moore v. Local Union 569 of the IBEW*, 989 F.2d 1534, 1544-46 (9th Cir. 1993), *cert. denied*, ____ U.S. ____, 114 S. Ct. 1066 (1994) ("*Moore I*"). During trial and on appeal, Local 569 was represented by Lewis Levy, an attorney with the firm of Levy, Goldman & Levy ("LG&L").

In 1987, Moore brought a separate, ultimately unsuccessful action against Fischbach. Judge Brewster approved an arbitration award for Fischbach of over $224,000 in fees under the fee-shifting provision in the collective bargaining agreement. Moore appealed this award. In 1995, the Ninth Circuit reversed, holding that the fee-shifting provision violated the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. 411(a)(4). *Moore v. Local 569 of the IBEW*, 53 F.3d 1054 (9th Cir. 1995), *cert. denied*, __ U.S. ___, 116 S.Ct. 908 (1996)("*Moore II*"). Fischbach was represented by Steven C. Sayler, an attorney with the firm of Hillyer & Irwin ("H&I").

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Shortly after the Ninth Circuit affirmed the $66,000 judgment for Moore against Local 569, Moore moved for a release of the proceeds of the $70,000 bond posted by Local 569. Several of Moore's judgment creditors filed claims against the bond. In a bond disposition hearing Judge Brewster distributed over $45,000 to Fischbach to satisfy its fee awards and granted an offset of over $14,000 to Local 569 for reporter transcript costs taxed to Moore as a losing appellant. During the proceedings regarding the bond, Levy represented Local 569 and Sayler represented Fischbach. In 1995, the Ninth Circuit affirmed in part and reversed in part, holding that Judge Brewster had jurisdiction over the distribution of the bond proceeds, and that the offset for Local 569 was proper, but that the distribution to Fischbach was improper in light of the Ninth Circuit's ruling that the fee award to Fischbach violated the LMRDA. *Moore v. Local 569 of the IBEW*, No. 94-55120, 1995 WL 2678650 (9th Cir. May 8, 1995) (citing *Moore II*, 53 F.3d 1054)("*Moore III*").

In January 1994, Moore filed this action against Judge Brewster, Kathy Lowe (his law clerk), Don Hendrix (Clerk of the United States District Court for the Southern District of California), Levy, LG&L, Sayler, and H&I. Moore alleged that the conduct of the defendants with regard to the $70,000 bond constituted a Due Process violation, civil conspiracy, fraud, and intentional infliction of emotional distress. The court granted summary judgment for the private attorney defendants and dismissed under Rule 12(b)(6) the claims against Judge Brewster and the court personnel defendants.

On August 25, 1994, Moore appealed these dismissals (Appeal No. 94-56334). On August 29, 1994, Moore filed a motion for leave to amend his complaint. On September 16, 1994, the district court denied Moore's motion. Moore appealed this latter decision (Appeal No. 94-56429). On July 31, 1996 Moore filed a motion requesting that this court take judicial notice of two orders and a letter concerning distribution of related funds.

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II

The district court dismissed the claims against Judge Brewster, Lowe, and Hendrix on the ground of judicial immunity. Dismissal based on judicial immunity is reviewed de novo, *Crooks v. Maynard*, 913 F.2d 699, 670 (9th Cir. 1990)(citing *Brewer v. Blackwell*, 692 F.2d 387, 390 (5th Cir. 1982)).

[1] Judge Brewster enjoys absolute judicial immunity from Moore's action. A judge is generally immune from a civil action for damages. *Mireless v. Waco*, 502 U.S. 9, 9(1991). "The judicial or quasi-judicial immunity available to federal officers is not limited to immunity from damages, but extends to actions for declaratory, injunctive and other equitable relief." *Mullis v. Bankruptcy Court for the District of Nevada*, 828 F.2d 1385, 1394 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040 (1988). *Cf. Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984) (state officials enjoy judicial or quasi-judicial immunity from damages only).

[2] Moore's allegations of legal error do not deprive Judge Brewster of judicial immunity. This immunity applies "'however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff.'" *Cleavinger v. Saxner*, 474 U.S. 193, 199-200 (1985) (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347). "Grave procedural errors or acts in excess of judicial authority do not deprive a judge of this immunity." *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir.), *cert. denied*, 488 U.S. 995 (1988).

[3] Nor is judicial immunity lost by allegations that a judge conspired with one party to rule against another party: "a conspiracy between judge and [a party] to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges. . ." *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc). Even if, as Moore alleges, Judge Brewster conspired with Sayler to act as an advocate for Fischbach, and

interfered with the release of the bond proceeds for the benefit of Fischbach, judicial immunity would bar Moore's action against Judge Brewster.

[4] While the doctrine of judicial immunity knows two limits, neither applies to Judge Brewster. First, a judge "will be subject to liability. . .when he has acted in the 'clear absence of all jurisdiction.'" *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (quoting *Bradley*, 80 U.S. (13 Wall.) at 351). Judge Brewster, however, was acting well within his jurisdiction, as the Ninth Circuit explained in another of Moore's appeals:

> In the instant case the contested orders were made well after the issuance of the [Ninth Circuit's] mandate. Moreover, the order regarding Local 569's entitlement to an offset was made pursuant to the district court's authority to tax costs, and the orders regarding [Moore's judgment creditors] were made pursuant to Fischbach's writ of execution and the [other] creditors filing of valid liens. The district court had jurisdiction to make those orders int his case.

Moore III, No. 94-55120, 1995 WL 268650 at 1. Second, only judicial acts are protected. *Stump*, 435 U.S. at 360. Judge Brewster's distribution of the $70,000 bond to Moore's creditors following a hearing is a function normally performed by a judge. Moreover, the parties believed they were dealing with Judge Brewster in his judicial capacity. Indeed, Moore's complaint repeatedly refers to Judge Brewster as having acted "under color of law" and as an "officer of the court."

[5] Hendrix, while acting as Clerk of the United States District Court for the Southern District of California, in many of his actions performed quasi-judicial functions as to which he was entitled to absolute immunity. *Mullis*, 828 F.2d at 1390; *Sharma v. Stevas*, 790 F.2d 1486 (9th Cir. 1986); *Morrison v.*

Jones, 607 F.2d 1269, 1273 (9th Cir. 1979), *cert. denied*, 445 U.S. 962 (1980). Even if, as Moore alleges, Hendrix deceived Moore regarding the status of the bond and improperly conducted hearings to assess costs, all in coordination with Judge Brewster, such acts would fall within Hendrix's quasi-judicial duties and are thus protected by absolute immunity.

[6] Lowe, while acting as law clerk for Judge Brewster, enjoyed absolute judicial immunity. In determining this, we follow the reasoning adopted by the Second Circuit in *Oliva v. Heller*, 839 F.2d 37 (2nd Cir. 1988). The concern for the integrity of the judicial process that underlies the absolute immunity of judges is reflected in the extension of absolute immunity to "certain others who perform functions closely associated with the judicial process." *Id.* at 39 (quoting *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985)). Under this functional approach, immunity flows from the nature of the responsibilities of the individual official. *Id.* Because a law clerk is "probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function," we find that Lowe, who was clearly assisting the judge in carrying out judicial functions, is covered by the doctrine of absolute immunity. See also *Mitchell v. McBryde*, 944 F.2d 229, 230 (5th Cir. 1991) ("[I]t is plain from the reasoning underlying our prior decisions that the judge's law clerk, when assisting the judge in carrying out the former's judicial functions, is likewise entitled to absolute immunity.").

III

The district court granted summary judgment for Levy and LG&L on the ground of issue preclusion. The availability of a defense based on issue preclusion is reviewed de novo, *Pardo v. Olson & Sons, Inc.*, 40 F.3d 1063, 1066 (9th Cir. 1994).

[7] Issue preclusion bars Moore's action against Levy and LG&L. The doctrine of issue preclusion "prevents relitigation of all 'issues of fact or law that were actually litigated and

necessarily decided' in a prior proceeding." *Robi v. Five Platters, Inc.*, 606 F.2d 318, 322 (9th Cir. 1988) (quoting *Segal v. AT&T, Inc.*, 606 F.2d 842, 845 (9th Cir. 1979)). The defense of issue preclusion may be pled against a party to a prior judgment by a stranger to such judgment. *Green v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1383-84 & n.2 (9th Cir. 1978). Moore alleges that Levy and LG&L, while acting as counsel for Local 569, wrongfully obtained a $14,000 offset against the $70,000 bond posted by Local 569. However, the propriety of this offset has been litigated and decided; in May 1995, the Ninth Circuit held that Judge Brewster did not abuse his discretion when he granted this offset. *Moore III*, 1995 WL 268650 at 2.

IV

The District court granted summary judgment for Sayler and H&I on Moore's claims for civil conspiracy, fraud, and emotional distress. Summary judgment is reviewed de novo. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, ___U.S. ____, 116 S. Ct. 1261 (1996).

[8] Moore failed to produce sufficient evidence to survive summary judgment on his civil conspiracy claim. The indispensable elements of civil conspiracy include a wrongful act and knowledge on the part of the alleged conspirators of [the conspiracy's] unlawful objective. *Kidron v. Movie Acquisition Corp.*, 47 Cal. Rptr. 752, 757-58 (Cal. Ct. App. 1987). Yet Moore produced no evidence of either a wrongful act or wrongful intent. Indeed, Moore's complaint alleges only that Sayler moved for the distribution of a portion of the $70,000 bond to Fischbach, served Moore with notices of liens, communicated with court personnel, and appeared before Judge Brewster regarding the bond, all of which were proper actions to realize on Fischbach's judgment against Moore.

[9] Moore failed to produce sufficient evidence to survive summary judgment on his fraud claim as well. The

indispensable elements of a fraud claim include a false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages. *Bank of the West v. Valley Nat'l Bank of Arizona*, 41 F.3d 471, 477 (9th Cir. 2994) (quoting *Hackethal v. National Cas. Co.*, 234 Cal. Rptr. 853 (Cal. Cr. App. 1987)). However, Moore failed to allege, let alone produce evidence of, a single example of misrepresentation by Sayler. Nor did Moore allege scienter, intent to defraud, or reliance by Moore on anything Sayler did or said.

[10] Moore also failed to plead fraud with adequate particularity. *See* Fed.R.Civ.P.9(b)("In all averments of fraud. . . , the circumstances constituting fraud . . .shall be stated with particularity."). *See also In re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1548 (9th Cir. 1994)(en banc)(requiring that plaintiff include statements regarding the time, place, and *nature* of the alleged fraudulent activities). Moore failed to identify any specific statements or actions by Sayler, let alone explain in what way such statements or actions were fraudulent.

[11] Finally, Moore's action for intentional infliction of emotional distress is barred by California Civil Code Sec. 47(b)(2), which privileges communications made during judicial proceedings. California's litigation privilege protects communications "(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Silberg v. Anderson*, 266 Cal.Rptr. 638, 642 (Cal. 1990). California courts have specifically applied this litigation privilege in actions alleging intentional infliction of emotional distress. *Ribas v. Clark*, 696 P.2d 637 (Cal. 1985). Moore alleged that Sayler and the court improperly communicated about Fischbach's interest in the bond, that the defendants agreed to illegally deprive Moore of the bond's protections, and that the defendants fraudulently misled him. All of these alleged communications were made by litigants during the

course of judicial proceedings, and all had a logical relation to the object of litigation, i.e., the bond, and therefore fall within the scope of Sec. 47(b)(2).

V

[12] Moore filed his motion to amend on August 29, 1994, four days after he filed his notice of appeal. By filing the notice of appeal, Moore divested the district court of its jurisdiction over the matter. *Davis v. United States*, 667 F.2d 822, 824 (9th Cir. 1982). Accordingly, we remand with instructions to vacate the denial of Moore's motion to amend and to dismiss the motion for lack of jurisdiction. *See id.*

VI

Pursuant to Moore's request, we take judicial notice of supplemental documents concerning the disbursement of funds. We affirm the order of the district court dismissing Moore's claims against United States District Court Judge Rudi M. Brewster, Kathy Lowe and Don Hendrix on the ground of judicial immunity, the order granting summary judgment for Levy and LG&L on the ground of issue preclusion, and the order granting summary judgment for Sayler and H&I on the ground that the record contained no substantial evidence to support the claims. The court exercises its discretion not to award attorneys fees on appeal to Levy and LG&L.